Supreme Court, U.S.
FILED
JUN 6 - 2006
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No. 051573

IN THE

United States Supreme Court

PT PERTAMINA (PERSERO), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: June 7, 2006

QUESTION PRESENTED

In interpreting foreign law, do principles of comity and the requirements of Rule 44.1 of the Federal Rules of Civil Procedure mandate that a federal court give respectful consideration and substantial deference to a foreign sovereign's own interpretation and explanation of the substance of its domestic laws?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner PT Pertamina (Persero) is wholly owned by (but a separate juridical entity from) the Government of the Republic of Indonesia.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the decision of the United States Court of Appeals for the Second Circuit, Pet. App. 2a, except that Petitioner became a limited liability company under Indonesian law as of September 18, 2003, and is now named PT Pertamina (Persero).

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Petitioner Pertamina PT (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully petitions this Court for a writ of certiorari to review the judgments in this action of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The summary decision of the United States Court of Appeals for the Second Circuit, which was not published in the federal reporter, appears in the Appendix of the Petition ("Pet. App.") at 1a-5a. The judgment of the United States District Court for the Southern District of New York appears at Pet. App. 6a-13a ("Final Judgment"). The Second Circuit's December 10, 2002 Opinion is reported at 313 F.3d 70 and appears at Pet. App. 92a-130a. The district court entered numerous related orders, which appear at Pet. App. 14a-82a, 89a-91a, and 131a-137a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its final judgment on March 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 44.1 of the Federal Rules of Civil Procedure provides, in relevant part: "The court, in determining foreign

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[1] Pertamina also supports the arguments made by the Ministry of Finance of the Republic of Indonesia in its petition for a writ of certiorari from the Second Circuit's decision, which, Pertamina understands, is also being filed today.

law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."

STATEMENT OF THE CASE

In its decision below, the United States Court of Appeals for the Second Circuit summarily affirmed the district court's judgment, holding, among other things, that the Petitioner owned the Refinery Revenues (as such term is defined below) and that, therefore, those funds were subject to execution by the Respondent (hereinafter referred to as "KBC"). In doing so, the Second Circuit, as well as the district court, completely disregarded applicable Indonesian law, which, indisputably, governs the question of ownership of the funds in the Refinery Accounts.

Background Of The Dispute

The Indonesian Constitution and the laws of Indonesia establish that the Government of Indonesia (the "Government") is the exclusive owner of the nation's natural resources, which it must exploit only for the benefit of the Indonesian people. Pet. App. 95a. Pertamina is an oil and gas company owned and controlled by the Government. *Id.* It engages in oil and gas exploration, extraction, processing, marketing, transportation and distribution. *Id.* In November 1994, KBC entered into two contracts—a "Joint Operation Contract" and an "Energy Sales Contract"—with Pertamina and another Government-owned entity, Persero ("PLN"). Under the contracts, KBC was to develop geothermal energy extraction facilities in the Karaha

area of West Java, Indonesia. *Id.* at 96a. KBC had not begun to build a power plant, nor even obtained the necessary financing, when the Asian economic crisis of 1997-98 struck Indonesia. In 1997 and 1998, after the Indonesian Rupiah lost value against the dollar (which made it impossible for public and private entities to meet their dollar-denominated obligations) and at the insistence of the International Monetary Fund, former Indonesian President Suharto suspended the KBC project. Pertamina had nothing to do with the suspension of the project. *Id.* at 97a.

KBC initiated an arbitration under the two contracts in 1998, and, on December 18, 2000, the arbitral panel issued a $261 million award against Pertamina and PLN. *Id.* at 98a. There were serious flaws in the procedures relating to the arbitration (including the selection of arbitrators and consolidation of arbitrations) as well as the award issued by the panel. For example, the panel found that Pertamina had breached the contracts with KBC, but it did not identify any substantive provisions of the contracts that were violated, nor did it discuss the relevant Indonesian law governing the contracts. With regard to the lost profits portion of the award (which amounted to $150 million), KBC had admitted that it could not have raised the required third-party non-recourse financing for the power plant because of the economic crisis. The panel, however, found that one of KBC's American parents would have put $500 million into the project, even though there was no contemporaneous evidence to support KBC's assertion and the panel effectively denied Pertamina's request for discovery on the issue.

Proceedings In The United States

KBC moved for confirmation of the arbitration award before the United States District Court for the Southern District of Texas (the "Texas Court"). Pertamina opposed confirmation based on the numerous defects in the award, but the Texas Court confirmed the award in December 2001 and entered judgment against Pertamina in the amount of $261 million plus 4% interest per annum.

After registering the Texas Court's judgment in New York in February 2002, KBC moved for ex parte writs of execution before the United States District Court for the Southern District of New York (the "New York Court") pursuant to N.Y. C.P.L.R. § 5222(b). Pet. App. 99a-100a. The New York Court issued writs of execution authorizing KBC "to execute upon any property of Pertamina within this jurisdiction in satisfaction of the [Texas Court's judgment]." *Id.* (emphasis added). The New York Court issued restraining notices that KBC served on Bank of America and Bank of New York, among others. In response to those restraining notices, Bank of America restrained funds in excess of $270 million in twenty-two trust accounts that were in Pertamina's name. Pet. App. 62a.

The Retention Fees

Pertamina and the Ministry of Finance of the Republic of Indonesia (the "Ministry") opposed the writs of execution and moved to quash the restraining notices in March 2002. In an order dated April 24, 2002 (the "April 2002 Order"), the New York Court partially granted the motions and held that the only property that could be restrained was that portion of the funds in fifteen trust accounts at Bank of America (what came to be known as the "Adjudicated

Accounts") that constituted Pertamina's "Retention Fee." Pet. App. 135a at ¶¶ 11-15. The Second Circuit affirmed the April 2002 Order in December 2002 (the "December 2002 Opinion"). Pet. App. 130a.

The Retention Fee arises from the following mechanism adopted by the Indonesian Government: in fulfilling the Government's responsibility to exploit Indonesia's natural resources for the benefit of its people, Pertamina entered into Production Sharing Contracts with private contractors who had the responsibility for development, production, transportation, and marketing activities relating to natural gas production in specified geographic areas. Pet. App. 100a-102a. The contractors delivered the extracted natural gas to Pertamina, which, in turn, transported it for domestic sale or for conversion into liquefied natural gas ("LNG") at liquefaction plants. Pertamina sold the LNG to foreign buyers, who remitted payments to trust accounts in New York, such as the Adjudicated Accounts. *Id.* In accordance with the agreements relating to each such account, the bank trustee was first required to make payments for debt service, production costs and trustee expenses. *Id.* The excess amount in the accounts, referred to as the Net Operating Income, was then distributed to Pertamina and the private contractor pursuant to the terms of the relevant Production Sharing Contract. *Id.* Pertamina's interest in the Net Operating Income was transferred directly to the Ministry's account with Bank of Indonesia, the Indonesian Central Bank, in Jakarta. *Id.* Pertamina was entitled to a fee, mandated by Indonesian law and calculated at 5% of the Net Operating Income transferred to the Ministry, which is the "Retention Fee." Pet. App. 135a at ¶ 14. The balance of those funds belonged to the Government.

Pursuant to the December 2002 Opinion, the New York Court was supposed to calculate the amount of the Retention Fees, so that the remainder of the funds in the Adjudicated Accounts could be released to the Government. The New York Court, instead of releasing the funds owned by the Government in accordance with the December 2002 Opinion and as required by the Foreign Sovereign Immunities Act (the "FSIA"), decided to secure KBC's judgment by using the funds restrained in the Adjudicated Accounts, irrespective of whether such funds constituted Retention Fees or property of the Government. Pet. App. 91a. Pertamina and the Government immediately appealed, but the Second Circuit dismissed the appeal for lack of finality. Pet. App. 83a-88a. The Second Circuit, however, reminded the New York Court that "no portion of the Ministry's funds can serve as security to satisfy the debt of Pertamina." *Id.* at 87a.

Subsequent to that opinion by the Second Circuit, the New York Court proceeded to the determination of the amount of the Retention Fees in the Adjudicated Accounts, and the ownership of funds held in the other accounts that had also been garnished, known as the Refinery Trust Accounts.

With respect to the Retention Fees, Pertamina and the Ministry argued that the restraining notices served in February of 2002 were ineffective as to Retention Fees passing through the Adjudicated Accounts after June 7, 2002, because of the fact that the amount already restrained through that date in the Adjudicated Accounts had reached the statutory cap under N.Y. C.P.L.R. § 5222(b) (twice the judgment amount). Pet. App. 177a-178a. Thus, according to Pertamina and the Ministry, and pursuant to the Decem-

ber 2002 Opinion, the New York Court was required to limit the amount restrained in the Adjudicated Accounts to the funds corresponding to the Retention Fees, and had to release the remainder to the Government.[2]

The New York Court disagreed and ruled that Retention Fees passing through—but no longer remaining in—the Adjudicated Accounts after June 7, 2002 should ***retroactively*** be "deemed to be withheld," and that the total amount of the restrained revenues in the Adjudicated Accounts were a "substitute for the withholding duty" of Bank of America with respect to the Retention Fees. Pet. App. 80a. In essence, the New York Court used a substitution of funds analysis not found in New York law and that, in this case, was in direct contravention of the FSIA provisions providing for immunity from execution for the assets of a foreign sovereign. The clear effect of the New York Court's rulings was that funds belonging to the Government were treated as Retention Fees belonging to Pertamina, and made subject to execution.

On May 19, 2004, the New York Court also ruled that an additional $132 million in Retention Fees had passed through in 2003, and ordered that they should also be "retroactively" restrained. In doing so, the New York Court ignored Indonesian laws that terminated Pertamina's

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[2] The amounts restrained by Bank of Amer[illegible] the Adjudicated Accounts were approximately $503 million. In June [illegible] 2002, the New York Court ordered Bank of America to release $226 million and continue to restrain $277 million on the theory that these funds were sufficient to cover the judgment entered by the Texas Court, along with interest. Pet. App. 72a. Of the $277 million that continued to be restrained, only a small portion comprised Retention Fees, and the balance belonged to the Government. *Id.* at 74a.

entitlement to Retention Fees as of January 1, 2003. Pet. App. 51a-52a.

The Refinery Revenues

The April 2002 Order focused on the Adjudicated Accounts and the Retention Fees and did not deal with funds restrained in another set of accounts, the Refinery Trust Accounts. However, in October of 2004, the New York Court determined that the funds in three accounts holding revenues from the export of petroleum products refined at Indonesian oil refineries (the "Refinery Revenues"), amounting to $452.7 million, belonged to Pertamina. The New York Court again ignored Indonesian law and Government directives establishing that the funds in the Refinery Trust Accounts were not property of Pertamina, but instead were property of the Government. The reasoning of the New York Court was that the Government did not take immediate possession of the Refinery Revenues and, therefore, did not own them.

Pursuant to Indonesian laws and its constitutional mandate, the Government has undertaken to ensure that oil-based fuels (referred to in Indonesian regulations as "BBM") are made available to all the people of Indonesia at a consistent price. Pet. App. 25a-26a. The Government has delegated this responsibility to Pertamina. *Id.* Pertamina produces and distributes BBM through the operation of Government-financed oil refineries on a "no-loss no-profit" basis. *Id.* at 27a. If the domestic supply of BBM products is insufficient to meet the demands of the Indonesian people, Pertamina imports BBM products on behalf of the Government. At the Government-financed refineries, Pertamina also produces non-BBM products (such as naptha

and lubricants) for domestic use and export. The Refinery Revenues are revenues that resulted from the export of non-BBM products. *Id.* at 26a.

To the extent the total cost of producing BBM exceeds the revenues from Pertamina's sales of domestic BBM, Indonesian law requires the Government to make up the difference to ensure that Pertamina does not suffer a loss. If, however, Pertamina's domestic BBM revenues exceed the total cost, Pertamina's "profit" must be transferred to the Government. *Id.* at 27a. The revenues from Pertamina's export and domestic sales of non-BBM products are used to reduce the total production costs in the BBM system, which either reduces the Government's subsidy obligation or increases the amount Pertamina must transfer to the Government. *Id.* Thus, the Refinery Revenues in the Refinery Trust Accounts constituted a central element of the Indonesian BBM system. Pertamina, acting as a trustee, used the funds in the Refinery Trust Accounts and listed them as income on its financial statements because it had the responsibility to account for them on an annual basis and maintain that accounting for the benefit of the Government. *Id.* at 28a-30a. But, under Indonesian law, it was not Pertamina's money.

The Second Circuit's Decision

In total, the New York Court "restrained and/or deemed restrained" approximately $776 million in Retention Fees and Refinery Revenues. Pet. App. 12a at ¶ 13. The New York Court ordered the turnover of $271 million (plus interest) to KBC from the $776 million restrained, but stayed the effect of its turnover order pending appeal. *Id.* at ¶¶ 15-16.

In reviewing the New York Court's Final Judgment, the Second Circuit stated that "a determination that the refinery funds [i.e., the Refinery Revenues] belonged to Pertamina would afford KBC full recovery." Pet. App. 4a. Based on this statement, the Second Circuit considered only the portion of the New York Court's Final Judgment that related to ownership of the Refinery Revenues.

The Second Circuit affirmed the New York Court's Final Judgment with respect to the ownership of the Refinery Revenues, holding that Pertamina had offered no evidence under Indonesian law supporting its contention that the Government owned those funds. Pet. App. 5a. That holding disregarded the Indonesian BBM regime, which governs the ownership of the Refinery Revenues at issue.

REASONS FOR GRANTING THE PETITION

CONTRARY TO WELL-ESTABLISHED PRINCIPLES OF INTERNATIONAL COMITY, THE SECOND CIRCUIT AFFIRMED A DECISION OF THE LOWER COURT THAT COMPLETELY DISREGARDED APPLICABLE FOREIGN LAW AS WELL AS THE FOREIGN SOVEREIGN'S EXPLANATION AND INTERPRETATION OF ITS DOMESTIC LAW, WARRANTING THE EXERCISE OF THE COURT'S SUPERVISORY POWER.

Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation[.]" *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). It serves both to "promote justice between individuals" and "to produce a friendly intercourse between the sovereignties to which they belong[.]" *Id.* at 165. "[T]he federal judiciary has relied on principles of

comity and international law to protect foreign governments in the American legal system." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002). Courts invoke comity, for example, to enforce foreign judgments, whether issued by a civil or common law jurisdiction. *See, e.g., United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 169 (3d Cir. 1997) (comity "creates a strong presumption in favor of recognizing foreign judicial decrees.") Such deference "fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." *Id.* (citing cases).

This Court "ha[s] long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 546 (1987). For example, in *The Schooner Exch. v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812) (mem.), this Court embraced, "[as] a matter of grace and comity on the part of the United States," the immunity of a foreign sovereign from suit in United States courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Conversely, short of war or some positive intervention by the political branches, comity also holds all U.S. courts open to foreign sovereigns, even those with which the Nation may have difficult relations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964).

The achievement of these "worthy goals of comity[,]" *Gen. Elec. Co. v. Deutz A.G.*, 270 F.3d 144, 160 (3d Cir. 2001), requires that the federal courts defer to a foreign sovereign's determination of the content of its own laws. Applying this principle, the federal courts have accorded

"substantial deference" to the "construction" a foreign sovereign "places upon its domestic law" when the foreign sovereign is a litigant. *In re Oil Spill by Amoco Cadiz,* 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places upon its domestic law."); *Access Telecom, Inc. v. MCI Telecomms. Corp.,* 197 F.3d 694, 714 (5th Cir. 1999) ("courts may defer to foreign government interpretations"). As courts have recognized, "[g]iving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable." *In re Oil Spill by Amoco Cadiz*, 954 F.2d at 1312.

In fact, the Second Circuit, in its December 2002 Opinion, recognized the principle of deference to the position of a foreign sovereign in connection with the interpretation of that sovereign's laws. "Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." Pet. App. 128a-129a.

In its summary decision affirming the New York's Court Final Judgment, however, the Second Circuit failed to adhere to, and follow, these principles. It completely disregarded Indonesian law and held that Pertamina owned the Refinery Revenues because they constituted "property within Pertamina's control, which only Pertamina controls." Pet. App. 5a. That conclusion ignored Indonesian law governing the relationship between Pertamina and the Government, the BBM system, and the Indonesian limitations applicable to Pertamina's use of the funds in the Refinery Accounts. Further, the Second Circuit's methodology reflected an inappropriate presumption that Indone-

sian law was comparable to New York law, and a reluctance to carry out a thorough examination of the relevant foreign law, as both comity and Rule 44.1 of the Federal Rules of Civil Procedure require.

According to the Indonesian laws establishing the BBM system, Pertamina is responsible for producing and selling BBM and non-BBM products for both domestic use and export. The Refinery Revenues were generated from the export of non-BBM products. The key aspect of the BBM system, however, is that revenues from both BBM and non-BBM products are factored into the monetary reconciliation between Pertamina and the Government, designed to make sure that Pertamina functions on a "*no-profit no-loss*" basis. Pertamina is not at liberty to use the Refinery Revenues (or, for that matter, revenues from the sale of other non-BBM or BBM products) according to its own wishes but, on the contrary, is required, under Indonesian law, to apply them as a cost-reducing factor in the BBM reconciliation between Pertamina and the Government. If the reconciliation results in a profit, that profit is taken from Pertamina and transferred to the Government. If the reconciliation results in a loss, the Government covers the loss. One way or the other, Pertamina functions on a "*no-profit no-loss*" basis. Therefore, any funds Pertamina receives from the sale of BBM or non-BBM products, such as the Refinery Revenues, it holds only on behalf of, and for the account of, the Government.

While Pertamina and the Ministry submitted detailed evidence regarding the Indonesian laws establishing the BBM system and how that system functions, the Second Circuit stated that Pertamina failed to point to any "Indonesian legal directive that deems the refinery funds

[i.e., the Refinery Revenues] Indonesia's[.]" Pet. App. 5a. That conclusion ignored the evidence submitted by Pertamina and the Ministry showing that, under Indonesian law, the Refinery Revenues were required to be contributed into the BBM system and constituted a cost-reducing factor in BBM cost price. Pet. App. 26a-27a. Moreover, based on these legal directives and contrary to the Second Circuit's holding, Pertamina could not "spend those funds for any purpose," but was obliged to apply the Refinery Revenues to the BBM monetary reconciliation with the Government. Pet. App. 5a. In short, the Second Circuit deprived the Government of the Refinery Revenues in that, under the BBM system, they were intended to either increase the Government's receipts from Pertamina or reduce Pertamina's loss and, therefore, the Government's subsidy of that loss.

Likewise, the Second Circuit's conclusion that "Indonesia acts like a guarantor of Pertamina's BBM operation" (*see* Pet. App. 5a), lacks any support or basis under Indonesian law, and betrays a false assumption that Indonesian law and New York law are analogous. Under Indonesian law, the Government owns the Refinery Revenues; and since the Government owns them, it cannot, at the same time, act "like a guarantor" for the BBM operation. This ill-fated presumption exemplifies the Second Circuit's misapplication of Indonesian law—a misapplication stemming from its refusal to defer to the Government's interpretation of its own law.

The decision below failed to take into account the regulatory regime governing the BBM system and Indonesia's exploitation of its natural resources. *See, e.g.*, *PPG Indus. v. Costle*, 659 F.2d 1239, 1246 (D.C. Cir. 1981) (holding

that when interpreting statutes of uncertain meaning, the Court of Appeals would "look principally to the language and structure of the regulatory scheme, and to the policies that underlie it"); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Contrary to the statement in its December 2002 Opinion that "the support of a foreign sovereign for one interpretation [regarding the sovereign's laws] furnishes legitimate assistance in the resolution of interpretive dilemmas" (*see* Pet App. 129a), the New York Court and the Second Circuit turned a blind eye to Indonesia's legal system and the views of the Government regarding the laws that it established to ensure the exploitation of its natural resources for the prosperity of its people. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) (recognizing "the principle of supreme state sovereignty over natural resources.")

If the Second Circuit had correctly applied the principles of comity, it would have deferred to the foreign sovereign and its well-founded and reasonable interpretation of its own laws. The principal force underlying the comity doctrine is reciprocity. The United States would and should expect that a foreign court hearing an issue regarding U.S. regulation, adopted to support an important national policy, would afford substantial deference to the views expressed by representatives of the U.S. Government with respect to the proper operation and construction of such regulation. *See Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001) ("Reciprocity and cooperation are worthy goals of comity."). Yet the Second Circuit's ruling, and its lack of deference for clearly articulated Indonesian law, opens the door for foreign courts to ignore the U.S. Government's views regarding

U.S. laws and to decide such issues based on that jurisdiction's unguided interpretation of U.S. law. This Court should exercise its supervisory power to eliminate this threat to the comity doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below reversed.

Respectfully submitted,

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June 7, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 9th day of March, two thousand and six.

Docket Nos. 04-6551-cv(L) and 04-6672-cv(C)

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge.
Hon. Pierre N. Leval,
Hon. Sonia Sotomayor,
Circuit Judges.

In the Matter of an Arbitration Between

KARAHA BODAS COMPANY, L.L.C.,

Petitioner-Appellee,

v.

BANK OF INDONESIA, Non-Party-Witness,

Garnishee,

v.

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Non-Party-Respondent-Appellant,

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Respondent-Appellant.

APPEARING FOR APPELLANT PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA:	HENRY WEISBURG Shearman & Sterling LLP, New York, NY (Pieter Van Tol, Scott Horton, and Victoria Paladino, Lovells, New York, NY, *on the brief*).
APPEARING FOR APPELLANT MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA:	FRANK PANOPOULOS (Carolyn B. Lamm, R. Shawn Gunnarson, and Eric Grannon, *on the brief*), White & Case LLP, Washington, DC.

APPEARING FOR APPELLEE: CHRISTOPHER F. DUGAN, (James E. Berger, Matthew S. Dunne, Danielle W. Pierce, and Carolyn E. Morris, *on the brief*), Paul, Hastings, Janofsky & Walker LLP, Washington, DC.

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Southern District of New York.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the district court's judgment is AFFIRMED.

Respondent-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and non-party-respondent-appellant Ministry of Finance of the Republic of Indonesia ("Indonesia") appeal from the November 19, 2004 judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) directing the Bank of America to turn over to petitioner-appellee Karaha Bodas Company, L.L.C. ("KBC") funds restrained to secure a money judgment against Pertamina.

We assume familiarity with the facts and procedural history and provide only a selective recitation here. On February 22, 2002, the district court issued restraining notices requiring several banks in the Southern District of New York to restrain funds deposited into certain trust accounts held in Pertamina's name. Of those, the "refinery accounts" received funds from Pertamina's export sale of refined petroleum products. The parties dispute whether funds flowing through the refinery accounts (the "refinery

funds") were Pertamina's, and therefore subject to restraint and execution, or Indonesia's, and therefore not subject to restraint or execution. Because the amount that flowed through the refinery accounts, roughly $452 million, exceeds the current size of the underlying money judgment, roughly $319 million, a determination that the refinery funds belonged to Pertamina would afford KBC full recovery. We note that the precise funds deposited into the refinery accounts are no longer restrained. As reflected in the district court's March 18, 2004 order, and as confirmed at oral argument, the parties agreed that banks subject to the restraining notices would release all restrained funds to Indonesia except for an amount held in certain restrained accounts at the Bank of America that would be sufficient to satisfy the underlying money judgment. The parties agreed that these funds would secure KBC's recovery of whatever funds passing through any of the accounts at issue, including the refinery accounts, the court determined to belong to Pertamina.

To determine the ownership of property, we first consider possession. Because the refinery accounts were held in Pertamina's name, Pertamina is their presumptive owner. *See Karaha Bodas Co. v. Pertamina*, 313 F.3d 70, 86 (2d Cir. 2002). "[T]his presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in the manner of a trustee." *Id.* Such a relationship would be "established . . . by provisions of Indonesian law uniquely applicable," so we now look to that law. *Id.* at 87.

The appellants contend that the Indonesian "BBM" system establishes Indonesia's ownership of the refinery funds. We disagree. First, although the no-profit-no-loss

subsidy of the BBM regime does establish that Indonesia acts like a guarantor of Pertamina's BBM operation, it does not deprive Pertamina of control over the refinery funds. Pertamina is allowed to spend those funds for any purpose, such as building asphalt plants, subject only to budgetary limitations. Second, we find no inconsistency in the fact that Pertamina operates the refineries on behalf of Indonesia for the benefit of the Indonesian people and the proposition that Pertamina owns revenues generated from the sale of its output. In short, Pertamina points to no Indonesian legal directive that deems the refinery funds Indonesia's, *cf. id.* at 90-92, or indicates that upon their receipt, they are anything other than "property within Pertamina's control, which only Pertamina controls." *Id.* at 92. Because the presumption that Pertamina owns the refinery funds is unrebutted, the district court correctly held that those funds belonged to Pertamina and ordered the Bank of America to turn over the balance of the underlying money judgment to KBC.

For the foregoing reasons, the district court's judgment is AFFIRMED. Because the appellants may seek review in the Supreme Court, KBC's pending motion of July 5, 2005, to vacate the district court's stay of execution and turnover is DENIED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: _____
Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-MC-00098 (TPG)

In the Matter of an Arbitration Between

Karaha Bodas Company, L.L.C.,

Petitioner,

v.

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"), and,

Ministry of Finance of the Republic of Indonesia,

Respondents.

FINAL JUDGMENT

1. On December 4, 2001, the United States District Court for the Southern District of Texas entered judgment (the "Texas Judgment") in an action between Karaha Bodas Company, L.L.C. ("KBC") and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, now known as PT Pertamina (Persero) ("Pertamina"), confirming an UNCITRAL arbitration award requiring Pertamina to pay KBC a total of $261,166,654.92, plus interest at the rate of 4% per annum from January 1, 2001 until full payment. The United States Court of Appeals for the Fifth Circuit affirmed this judgment, and on October 4, 2004, the United States Supreme Court denied Pertamina's petition for writ of certiorari.

2. The Texas Judgment was registered in and became a judgment of this Court on February 22, 2002. On February 22, 2002, this Court issued writs of execution and restraining notices pursuant to Rule 69 of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules requiring, *inter alia*, Bank of America, N.A. and The Bank of New York to restrain certain funds that flowed through 24 trust accounts maintained in Pertamina's name at those banks in this District (such accounts, the "Trust Accounts").

3. Bank of America and The Bank of New York established 24 restraining accounts corresponding to the Trust Accounts in which to keep restrained funds (such accounts the "Restrained Accounts").

4. The Ministry of Finance of the Republic of Indonesia ("Ministry") challenged the District Court's jurisdiction under the Foreign Sovereign Immunities Act to restrain the funds, claiming that under Indonesian law the funds belonged to the Government of Indonesia and not the judgment-debtor Pertamina.

5. On April 24, 2002, the District Court issued a Final Order determining ownership of the funds restrained in fifteen of the Restrained Accounts located at Bank of America in New York (the "Adjudicated Accounts"). The April 24 Final Order held that with respect to these fifteen Adjudicated Accounts, which restrained revenues from the sale of Indonesian Liquefied Natural Gas ("LNG"): (1) Pertamina had a property right in those accounts to the extent of its Retention Fee and KBC could execute only upon an amount of the funds equal to the Retention Fee; and (2) the remaining LNG revenues were the Government's portion and cannot be executed upon by KBC. The Court certified

the ruling for interlocutory appeal and stayed its ruling pending the appeal. At the time of the April 24 Final Order, the amount of revenues restrained in the Adjudicated Trusts was $292,874,622.17.

6. The April 24 Final Order did not determine ownership of the funds restrained in the remaining nine Restrained Accounts because the record at the time was insufficient to determine whether KBC was entitled to execution against those accounts. These nine accounts were subsequently denominated as the "Unadjudicated Accounts." (The Adjudicated and Unadjudicated Accounts together make up the Restrained Accounts).

7. KBC, Pertamina, and the Ministry appealed the April 24 Final Order and the Ministry moved to lift the stay to the extent of the amount of funds belonging to the Government. On June 18, 2002, the U.S. Court of Appeals for the Second Circuit issued an Order modifying the District Court's stay to apply only to sufficient funds to satisfy the judgment and maintaining the stay only as to funds up to the amount of KBC's Judgment. As a result of the Second Circuit's order, the amount of funds restrained in the Adjudicated Accounts over and above the amount of the judgment, plus interest, was released. The amount of revenues left restrained in the 15 Adjudicated Accounts on that date equaled $276,633,524.59. The Second Circuit's order did not affect the nine Unadjudicated Accounts, and the amount of funds in those accounts continued to grow as funds payable to Pertamina from the corresponding Trust Accounts were restrained in the Unadjudicated Accounts pending adjudication of the funds' ownership.

8. In an opinion issued on December 10, 2002, the Second Circuit affirmed the District Court's April 24 Final

Order. Because the appeal was interlocutory and proceedings in the District Court would continue, the Second Circuit directed the District Court to continue the stay in force or to substitute one similar until such time as the parties' rights to the disputed funds were finally determined. The District Court then undertook to determine the amount of the Retention Fee associated with the funds restrained in the Adjudicated Accounts that could be executed upon, and to adjudicate ownership of the funds restrained in the nine Unadjudicated Accounts.

9. On March 18, 2004, this Court issued an Order modifying the restraining notices and requiring Bank of America to restrain funds equal only to the amount of the Texas Judgment plus accrued interest. The March 18 Order was entered without prejudice to the parties' positions in the litigation for the purpose of maintaining sufficient security for KBC's judgment and releasing to the Ministry funds not required for such security. The March 18 Order required, *inter alia*, (1) the release to the Ministry of all funds restrained in excess of the amount of KBC's judgment plus interest, and (2) that only funds equal to the amount of the Texas Judgment plus accrued interest was to be left restrained in the fifteen Adjudicated Accounts at Bank of America, plus whatever additional amounts would be necessary to true up accrued interest. The funds kept restrained were to be treated as security for such amounts, if any, as were finally held in further proceedings in this Court and on appeal to belong to Pertamina and to be subject to execution against Pertamina from among the funds that passed through the Trust Accounts since February 22, 2002.

10. The March 18, 2004 Order further provided that if the Texas Judgment is finally affirmed, the amount restrained at Bank of America would be paid to KBC to the

extent it is finally determined on appeal that funds passing through the Trust Accounts or restrained in the Restrained Accounts which belong to Pertamina and are subject to restraint are at least equal to the amount of the Texas Judgment plus interest. If it is determined that the amount belonging to Pertamina and subject to restraint is less than the amount of the Texas Judgment plus interest, the March 18 Order provided that the difference would be paid to the Ministry.

11. At various times, this Court has ruled that certain of the funds flowing through the Trust Accounts or restrained in the Restrained Accounts are the property of Pertamina and properly restrained and executable by legal process (such funds, "Executable Funds"). Specifically:

(a) On January 29, 2004, this Court issued an opinion ruling, among other things, that the restraining notices on the Trust Accounts corresponding to the Adjudicated Accounts continued to be effective under N.Y. C.P.L.R. § 5222(b) even after the Bank of America trustee stopped restraining further amounts in the Adjudicated Accounts as a result of the amounts restrained in those accounts reaching double the amount of the judgment or the Second Circuit's June 28, 2002 Order. According to the Opinion, as Retention Fees passed through the corresponding Trust Accounts, they would be deemed restrained even though the trustee did not literally withhold those funds in the Adjudicated Accounts, such that an equivalent amount from the funds already restrained in the Adjudicated Accounts would be considered as becoming Retention Fees. Thus, the January 29 Opinion held that the restraints applied to $178,161,403, which the Court determined to be the amount of Retention Fees earned in respect of the funds that passed through the Trust

Accounts corresponding to the Adjudicated Trusts from February 22, 2002 to the end of 2002, as well as to any Retention Fees earned thereafter, and that KBC was entitled to restrain and execute on this amount.

(b) On May 19, 2004, this Court issued on Opinion ruling, among other things, that Pertamina continued to earn a Retention Fee with respect to the Adjudicated Accounts, albeit in a reduced amount, until November 21, 2003. The May 19 Opinion further held that $132,992,871 of the funds that had passed through the corresponding Trust Accounts in 2003 represented the Retention Fees earned in respect of the those [*sic!*] accounts in 2003 and, for the same reasons provided in the January 29 Opinion, that amount was deemed restrained in the Adjudicated Accounts and executable.

(c) On October 6, 2004, this Court orally ruled that Pertamina had a property interest in an additional $8,384,679 and $3,690,000 of the revenues in the Unadjudicated Accounts that had been restrained from the sale of natural gas products because such amounts constituted, respectively, the amount of the 2002 Retention Fee earned in respect of the West Natuna, Corridor, and KMI Trust Accounts and the amount of Pertamina's participating interest in the contractors' share of the West Natuna Kakap Block PSC.

(d) On October 6, 2004, this Court also orally ruled that all funds that had been restrained and subsequently released from the Unadjudicated Accounts corresponding to the Cilacap, EXOR I, and MUSI II Trust Accounts and, after release, passing through the Cilacap and MUSI II Trust Accounts, through the date of this judgment, totaling $452,736,910, belong to Pertamina.

12. The amount of the judgment as of October 6, 2004, including simple interest at the rate of 4%, was $300,498,637.52.

The amount as of October 6, 2004 restrained in the Adjudicated Accounts at Bank of America pursuant to the Court's March 18, 2004 Order was $301,051,979.84.

13. As a result of the above-described rulings, this Court hereby finds that the amount of Pertamina property restrained and/or deemed restrained in the Adjudicated and Unadjudicated Accounts since February 22, 2002 totals $775,965,863, and that this amount of Executable Funds exceeds the Texas Judgment plus accrued interest.

14. On October 6, 2004, this Court ordered Bank of America to release immediately $29,318,992—representing the $3,690,000 held to be Pertamina's participating interest in the West Natuna Kakap Block PSC, and $25,628,992 of the funds from the EXOR I account—to KBC. The amount of the judgment on October 12, 2004 (the date of the release of $29,318,992) is $300,669,894.32. Consequently, the unpaid amount of the judgment, as of October 12, 2004, is $271,350,902.32.

15. As a result of the above rulings, Bank of America is hereby ORDERED, pursuant to Rule 69 of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules, to turn over to KBC $271,350,902.32, plus all accrued interest from October 13, 2004 to the date of full payment.

16. However, Bank of America's obligation to turn over such funds to KBC is hereby stayed until all U.S. appeals and review (if any) by the U.S. Supreme Court of this Final Judgment have been adjudicated or otherwise exhausted, or until further order of this Court.

17. During the period that the foregoing stay is in effect, simple interest at the rate of 4% per annum shall continue to

accrue on the unpaid amount of the judgment, and Bank of America shall continue to restrain funds sufficient to pay the unpaid amount of the judgment all interest that accrues in the future.

Dated this 22d day of October, 2004.

/s/ THOMAS P. GRIESA
Thomas P. Griesa
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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21 MC 98 M-18-302 (TPG)
Filed November 24, 2004

In the Matter of an Arbitration Between

Karaha Bodas Company, L.L.C.,

Petitioner,

—against—

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),

Respondent.

OPINION

Decision

THE COURT: Let me just dictate a ruling from the bench.

I want to in a sense incorporate by reference the statement I made on the record yesterday beginning at page 159 and concluding on page 164.

MR. PANOPOULOS: Your Honor, it is difficult to hear you. I'm sorry.

THE COURT: I am sure that's right. I wasn't even looking out.

I want to incorporate by reference in what I say now the statement that I made beginning at page 159 of the transcript yesterday and concluding on page 164.

What this proceeding is about is what we have referred to as the unadjudicated accounts. The reason that terminology is used is that, out of the several accounts at New York banks that were set up to handle sales of petroleum products coming out of Indonesia, certain of those accounts were the subject of a ruling which I made in April 2002 and were the subject of a Court of Appeals ruling which was handed down in December 2002.

At that time, meaning in April 2002, I was of the view that there was not enough evidence to permit an adjudication of property rights with respect to certain accounts, and they have henceforth been called the "unadjudicated accounts." That terminology will no longer apply after this afternoon because the court is proceeding to adjudicate these remaining accounts. [3] To the extent that I am not making any ruling about certain of the unadjudicated accounts, the reason is that with respect to certain of them there are no issues.

The record reflects in prior rulings that the problem in this litigation arises from the fact that petitioner KBC served restraining notices on the banks with respect to the accounts in question; that is, the adjudicated accounts and the so-called unadjudicated accounts. These restraining notices were served in February 2002.

(Continued on next page.)

[4] THE COURT: The purpose of the service of these restraining notices was to proceed with the enforcement of a large judgment, which had been entered in a federal court in Texas. That judgment was on appeal to the Fifth Circuit, but no supersedeas bond had been posted, and therefore, KBC was free to proceed with the enforcement of that judgment.

What I am putting on the record this afternoon will not in any degree attempt to deal with the amounts of money which have been at issue. It will not attempt to present a chronology of all that has occurred in this enormously complicated litigation. It will simply deal with the essential issue which needs to be disposed of. From the very start, the principal issue in controversy regarding these accounts has been the result of the fact that KBC's judgment in this case, obtained in the Federal court in Texas, is against the respondent Pertamina, a company in Indonesia owned by the Indonesian government. KBC of course can enforce its judgment only against the property of Pertamina.

The main issue has been the degree to which the moneys in the accounts were the property of Pertamina or were the property of the Republic of Indonesia. The republic has been permitted to appear in this proceeding to protect its rights. It has been permitted to appear in the district court, and it has been permitted to appear in the Court of Appeals for the Second Circuit.

[5] In connection with the adjudicated accounts, what was held by the district court and was affirmed by the Court of Appeals was that funds in these accounts, nominally paid to Pertamina, after the subtraction and payment by the banks of expenses and also the share or shares of joint venturers, what the Court held was that that amount belonged to the government of Indonesia except for what is called the retention fee. The District Court and the Court of Appeals relied on a regulation which provided that this amount of money less the retention fee shall be the government's portion. And I'm quoting the English translation of the Indonesian law, and it has this phrase "the government's portion."

It is of some interest now to note that under Indonesian law, after Pertamina received the retention fee, or was credited with the retention fee, Pertamina was required to pay a tax out of that retention fee and to pay a dividend to the Republic of Indonesia. Both the tax and the dividend were to be paid to the Republic of Indonesia. Despite the fact that Indonesian law required the payment of the tax and the dividend, the District Court and the Court of Appeals did not hold that the tax and the dividend were the property of the government. These courts did not hold that the tax and the dividend were part of the government's share of the moneys in question. What was held in substance was that the obligation to pay the tax and the obligation to pay the dividend meant **[6]** that Pertamina had to pay those amounts out of the retention fee, but that did not mean that the full retention fee was not the property of Pertamina. Those amounts were not property of the government until they were paid.

This is not an astonishing proposition. If a taxpayer earns a salary, the salary belongs to the taxpayer. It doesn't instantly belong to the government, although the taxpayer may ultimately owe the government a tax. If a corporation becomes obligated by a corporate resolution to pay a dividend, the revenues coming into the corporation are not the property of the shareholders the minute they come in. They become the property of the shareholders when the corporation pays the dividend.

So the only thing that was held to be the property of the government was what was referred to as the government's share of those moneys which had come into the bank accounts and were left after paying expenses to Mobil Oil or shipping companies and so forth.

Now we come to the issues before us on the so-called unadjudicated accounts. What constitutes the principal controversy on the unadjudicated accounts, if not the sole controversy, relates to products refined from crude oil at certain refineries. The first of these is the Cilacap refinery, and there is a claim that the total of $387 million has flowed into the relevant bank accounts resulting from sales [7] of refined products from the Cilacap refinery, and it is contended that this $387 million was subject to the restraining notices. The bank account or bank accounts involved in those Cilacap funds are at the Bank of America. Was it one account or two accounts?

MR. DUGAN: Just one account, I believe.

THE COURT: One account. OK. So there was one account in the Bank of America relating to Cilacap. And EXOR, was there one account or two accounts?

MR. DUGAN: One account there as well, your Honor.

THE COURT: What about MUSI?

MR. DUGAN: One account there as well. MUSI and EXOR are at Bank of New York.

THE COURT: So we have an account at Bank of New York relating to the refinery called EXOR, and, again, the funds involved sales of refined petroleum products refined from crude oil. The amount claimed to have flowed through that account and that was subject to the restraining notices is about $63 million. It appears that there is a controversy by the government of Indonesia on the EXOR account only as to about $38 million. But there is a substantial dispute nevertheless about the EXOR account.

Finally, there is the MUSI refinery account at the Bank of America of New York, and it is claimed that the amount of funds there which are subject to the restraining notices is about a [8] million and a half.

The statement ... I'm making is not intended to be a complete accounting of the unadjudicated accounts. There are certain accounts where no money has been seized, certain accounts where apparently there is no controversy. So the complete accounting for the unadjudicated accounts will come in some other form and I'm not going to deal with it in this statement. What I am trying to deal with is merely the issues in controversy about Cilacap, EXOR, and MUSI. And it can be said in order to simplify things that the issues are exactly the same with Cilacap, EXOR, and MUSI. So that I do not need to draw any distinction among those three accounts.

KBC contends that all of the money that flowed into those accounts was the property of Pertamina and, assuming a proper calculation of the time period and other subsidiary matters perhaps, basically all of the funds flowing through these accounts were the property of Pertamina and subject to the restraining notices.

The government of Indonesia asserts that all of the funds belonged to the government of Indonesia. Pertamina takes the same position as the government. I don't think there will be any confusion on nomenclature. At various times in this litigation, we have referred to the republic. At times we have referred to the ministry of finance. In the hearings in the last two days we have talked mainly in terms of the government, [9] and I will probably speak in that fashion in my statement now.

When resolving the question of who the funds belonged to, the Court is looking to Indonesian law, as the Court did in connection with the earlier adjudicated accounts. But when the crucial factors are considered, Indonesian law is really no different from New York law. This was made abundantly clear in the discussion held on the record yesterday

morning, and it is clear form the voluminous papers submitted on the motions before the Court.

Incidentally, I neglected to say exactly what motions are before the Court. However, it is sufficient to simply state that there is a motion by KBC seeking to have the Court declare that the moneys passing through the Cilacap, EXOR, and MUSI accounts belonged to Pertamina and were subject to the restraining notices. The republic for the government of Indonesia has filed an appropriate motion seeking a declaration that those funds belonged entirely to the government. Pertamina, as I have said, is on the same side of this controversy with the government.

So we are at the question of, who did the funds belong to. I started to describe the basics of the law. I will continue with that. Much of what I will say now is so obvious that anyone reading this would hardly think it worth saying, but in the context of the issues here, this has to be said. Although Pertamina is a company owned by the government of **[10]** Indonesia and although its activities in the oil industry are subject to very thorough regulation, nevertheless, Pertamina is a separate company, separate from the government of Indonesia as an entity. This was recognized in the earlier phases of this litigation, and the fact is still true. Pertamina can enter into contracts. Pertamina has its own bank accounts, in its own name. The contracts it enters into are in its own name. Pertamina sells petroleum products in its own name. It receives payments in its own name which go into its own bank accounts. Parties in Indonesia and parties abroad can do business with Pertamina. They can sell equipment and raw materials to Pertamina. The government itself, according to the record, sells crude oil to Pertamina. And Pertamina buys crude oil from the government in Pertamina's name, and undoubtedly owes the gov-

ernment the price for that oil. If a party enters into a transaction with Pertamina, for instance, selling Pertamina equipment or building facilities for Pertamina, Pertamina will be obligated to pay for that equipment or those facilities. If Pertamina should fail to pay, Indonesia has a judicial system which will entertain a lawsuit if that is necessary between the supplier and Pertamina.

It was conceded, as one would expect, that Indonesia has a law system, the same as the rest of the civilized world. If someone claims that Pertamina is wrongfully withholding [11] payment on an obligation, for instance, for the sale of equipment or for the construction of facilities, that party has legal recourse against Pertamina in Indonesian courts. If that party wins, that party can get a judgment against Pertamina.

That party does not sue the government or Indonesia. The government of Indonesia would lodge the strongest possible objection if the party sued the government on the basis of an obligation of Pertamina. So if the supplier, the party I'm talking about, wins a lawsuit, the party can get a judgment and can enforce that judgment. If Pertamina refuses to pay, that party can enforce the judgment by levying on property of Pertamina including bank accounts. This is of course in accordance with legal systems throughout the civilized world, and Indonesia is no exception.

Pertamina has financial statements. These financial statements are included in reports. These financial statements, like the financial statements in the United States or elsewhere, have balance sheets and income statements. Pertamina has its assets. And the assets are listed as such. They are not listed as assets of the government of Indonesia. Pertamina has liabilities, and they are listed as such. They are not listed as liabilities of the government of Indonesia.

Pertamina has income listed as such. It is not listed as income of the government of Indonesia. It has expenses listed as such. These are not listed as expenses of the government of [12] Indonesia.

Pertamina seeks financing, sometimes abroad. And these financial statements are used to help obtain financing. Needless to say, Pertamina does not seek financing by saying it is not liable for anything and only the government is liable, who is not a party to the contract in question.

Pertamina has debt obligations. And parties have a right to look to Pertamina on those debt obligations.

So all of this is in accordance with Indonesian law, Indonesian accounting practices. And these are the basics of the law and the accounting practices which exist.

Now, Pertamina sold refined petroleum products out of the refineries I mentioned. These products were exported and sold abroad. Purchasers paid for these products, and they paid Pertamina. And the funds that were paid were, according to agreement, deposited in the account at the Bank of America and the accounts at the Bank of New York. Expenses were paid under the administration of the banks. If there were any joint venturers, the joint venturers' shares were paid. In other words, whatever was needed to pay parties other than Pertamina was taken out of the funds and paid by the banks. What was left was in Pertamina's name and this was the net receipts after paying outside parties whatever they were due.

The funds were duly transmitted, or were subject to transmission, from the New York banks to bank accounts of [13] Pertamina in Indonesia.

Here let me pause to refer to a complication which I do not want to describe in detail, but let me try briefly to state the necessaries. The amount of money which ended up

literally staying, or being lodged in the New York banks was limited to the amount necessary to pay the judgment plus interest. This was done under the guidance of the Court of Appeals and also was implemented by the District Court and evolved in various ways that are not necessary to be described. So the amount actually lodged in New York banks pursuant to the restraining notices is a little over $300 million.

There are no funds from Cilacap, EXOR, or MUSI literally held up in New York banks. But the effect of court rulings and agreements is that if the Court decides that these funds were subject to restraint, the amounts that I have talked about as having flowed through these accounts will be deemed to be available to be applied to the judgment. This is not a perfect description, but it is as far as I'm going to go now. But this is why I have referred to the fact that amounts of money have flowed through the accounts. And that's what has happened. And the issue is, when those moneys flowed through the accounts, to whom did they belong? Pertamina or the government of Indonesia? If they belonged to Pertamina, they were subject to the restraining notices. If they belonged to the government of Indonesia, they were not subject to the [14] restraining notices.

I'm going back to the flow of the funds. As I said, the funds, after payment of expenses to outside parties, were in Pertamina's name. They were transmitted to Pertamina in Indonesia. There is no suggestion that these funds or any portion of them were paid to the government of Indonesia or seized by the government of Indonesia in any way because of some property interest asserted in these particular funds by the government. That was not done. This is a completely different picture from what was presented in connection with the adjudicated accounts.

These funds, in connection with Cilacap, EXOR, and MUSI, simply became part of the general funds of Pertamina, as well as receipts from other sales, and were used to pay the various expenses of Pertamina.

The record contains a financial statement of Pertamina for the year 2001. It shows a balance sheet as of December 31, 2001, and it shows a consolidated statement of income for the year ending December 31, 2001. There is also a statement for an earlier period, but I'm going to concentrate on the 2001 balance sheet and income statement.

The balance sheet lists assets of Pertamina. They include cash on hand in banks of about 20 trillion Indonesia rupiahs. Various other assets that one would expect are listed. The total assets are listed at what appears to be **[15]** about 96 trillion rupiahs. The figure is a little bit hard to read, but I believe it's about 96 trillion rupiahs.

The balance sheet, of course, lists liabilities and shareholders equity. Total current liabilities are listed at about 30 trillion rupiahs. Other liabilities appear to be about 37 or 38 trillion rupiahs. Stockholders equity is listed as about 28 trillion rupiahs. Total liabilities and stockholders equity is listed at about 96 trillion rupiahs. These are all listed as assets and liabilities and equity of Pertamina. They are not listed as assets and liabilities and equity of the government of Indonesia.

Now, in the consolidated statement of income, there is, as one would expect, a list of revenues and a list of expenses. The revenues for the year 2001 were about 212 or 213 trillion rupiahs. The figure is hard to read, but that is about it.

These revenues for 2001 included, as one would expect, the revenues from the export of oil products, the kinds of things which were going on with the Cilacap, EXOR, and

MUSI accounts. The amount for 2001 was about 14 trillion rupiahs. The income statement, of course, listed expenses. The items under expenses total about 201 trillion rupiahs. The item labeled "profit before government share" is listed as about 10 $^{1}/_{2}$ trillion rupiahs. It appears that, pursuant to certain legal provisions which came into effect when Pertamina was **[16]** started, that the government was entitled to a share of these profits. That share is listed for 2001 as about 6 trillion rupiahs.

The net profit after all things are considered is listed as about 4 $^{1}/_{2}$ trillion rupiahs.

All of these items are listed as revenues, expenses, profits, and so forth of Pertamina. And one would expect this to be done, in view of the fact that Indonesian law, as I have described, is not some weird concoction. It is in accordance with the law of the civilized world, and its accounting practices are of the same nature.

Now we come to the argument of the government. The argument of the government was summarized by me to a very substantial extent in the pages I referred to from yesterday's transcript, pages 159 through 164. Almost all of the factual basis for the government's argument is something that I accept. Pertamina, as I have said, is a company owned by the Indonesian government. It is heavily regulated by the Indonesian government. But the argument of the government in this proceeding is based on a quite specific set of circumstances. Indonesia, pursuant to clear law, has a program, or a policy, under which petroleum products are furnished to the people of Indonesia at prices which are set by the government and are based on a practice of government subsidies. This is referred to as the BBM program or policy. Pertamina participates in **[17]** this program, as it is directed to do by law. And in participating in this pro-

gram, Pertamina is obliged to act for the benefit of the Indonesian government and the people of Indonesia. Under this program, Pertamina refines crude oil, turns it into petroleum products such as gasoline and fuel oil, and Pertamina sells these products directly or indirectly to domestic purchasers in Indonesia. The record shows that to some extent the crude oil used in this program is lifted out of the ground by Pertamina, to some extent is lifted out of the ground by other parties, including the government of Indonesia or joint ventures between the the government of Indonesia and other parties. Where the government of Indonesia is involved in lifting crude oil and selling it to Pertamina, this is a sale by the government of Indonesia to Pertamina, and Pertamina pays the government for that crude oil.

Pertamina must sell the refined products at prices which accord with the regulations or policies of the BBM program. The program has been described on the record here as being for Pertamina a no-loss and no-profit situation. Although there may be technical exceptions to this basic concept that are suggested in parts of the evidence, the government and Pertamina assert that the BBM program was indeed a no-loss and no-profit program as far as Pertamina was concerned, and the Court accepts that basic proposition. This means that if, for a relevant period, Pertamina was selling [18] products to domestic purchasers in Indonesia and was making a profit, then that profit would need to be paid to the government of Indonesia. On the other hand, if Pertamina was selling at prices which resulted in a loss to Pertamina, then the government would pay a subsidy to Pertamina to cover that loss. The calculation of profit or loss would be made by the method one would expect--that is, taking the costs to Pertamina in connection with this program--that is, the cost of raw materials, the cost of refin-

ing, etc.--and then taking the revenues and determining which was larger. If the revenues exceeded the costs, there was a profit. If the revenues were less than the costs, there was a loss.

Now, here, it is necessary to deal with the circumstance, which is basically the main factor in the government's argument and Pertamina's argument, that revenues from export sales belonged to the government of Indonesia. The export sales were non-BBM sales. They were not subsidized. There were also some non-BBM domestic sales. All the non-BBM revenues were used in the calculation of whether there was a profit or loss in the BBM program. That is, even though the export sales were not BBM sales, and even though there were some domestic sales that were not BBM sales at the fixed prices, nevertheless, the revenues for such non-BBM sales were used in the calculation of whether there was a profit or a loss on the BBM program.

[19] One thing that has been said is that these revenues were a proxy for BBM costs. I am not sure what that means, but basically what happened is that these revenues were applied to reduce the BBM costs. Another way to put it is simply that they were added to the revenues on the BBM program. It's all the same thing.

If one wonders what happened to the costs associated with the non-BBM sales, the answer that has been given to the Court is that there were unitary costs and there were no specific costs associated, additional costs associated with the non-BBM sales. Exactly how that was accomplished is an accounting matter. It has not been gone into. But the Court does not doubt that that type of accounting would be quite legitimate.

So the non-BBM revenues were used as I have just described, and since we are concerned in our proceedings here with the non-BBM revenues derived from export sales, I will probably concentrate to some extent on those particular revenues in further discussion.

Now, in the consolidated statement of income for the year 2001, there is an item listed under Revenues entitled "reimbursement of fuel expenses from the government." And in the year 2001, that was about 61 trillion rupiahs. The record does not show exactly how that was calculated, but it is conceded by Pertamina that the method of calculation is what I **[20]** described a few minutes ago--that is, taking the costs of BBM sales and the revenues from the BBM sales, and then taking the revenues from the non-BBM sales to add to BBM revenues or reduce BBM costs and netting out what results from those figures. And for 2001, what netted out was 61 trillion rupiahs.

Pertamina and the government urge that because the BBM program was for the benefit of the government and for the people of Indonesia and because the export sales revenues were used in the calculation of profit or loss from that program, this means that the revenues from the export sales were the property of the government of Indonesia from the moment that they were earned.

This brings me to my conclusion. I conclude that Pertamina and the government have drawn an incorrect conclusion. The fact that the revenues from the export sales were used in the calculation of BBM profit or loss in the way I have described, this fact under no circumstances means that those revenues belonged to the government of Indonesia at any time, when they were passing through the banks in New York or at any time.

The fact that these revenues from the export sales were used to calculate Pertamina's profit or loss on the BBM program is indeed a very strong indication that these revenues belonged to Pertamina. The government of Indonesia, in 2001, [21] paid a very large subsidy. The reason the subsidy was not 14 trillion rupiahs higher than the 61 trillion rupiahs is because the government considered that the 14 trillion rupiahs from the export sales belonged to Pertamina and reduced the costs of the BBM program to Pertamina--that is, reduced Pertamina's costs. This is totally inconsistent with any idea that the 14 trillion rupiahs belonged to the government of Indonesia.

There is nothing about the BBM program or the accounting for it which takes away in the slightest from the fact that these revenues from the export sales belonged to Pertamina, were available to Pertamina to put in its bank accounts, were available for use by Pertamina to pay its expenses. None of that is in any degree contradicted by what has been asserted and what I have found about the BBM programs.

Now, in addition to the use of the revenues to calculate the subsidy of 61 trillion, which is shown in the income statement of 2001, the 14 trillion was a line item in the income statement. The specific use of the 14 trillion in calculating the subsidy is not shown. That calculation is not shown and is not in any paper that is on the record here, although the method of that calculation has been conceded.

But, in addition to using the 14 trillion in a perfectly obvious way to calculate the subsidy due, the 14 trillion rupiahs was listed as a line item in the consolidated statement of income. The 14 trillion rupiahs had been received [22] by Pertamina from the export sales. And those 14 trillion rupiahs are shown as a line item on the statement of

income. It's there. This is not something dreamed up by anybody. The statement of income simply does include, in black and white, 14 trillion rupiahs as revenues from the export sales. That 14 trillion rupiahs is used as one of the items adding up to the total revenues of 212 trillion rupiahs. It is used as part of the calculation leading up to the ultimate figure of profit before the government's share, and so forth.

This is in accordance with proper accounting practices. Nobody suggests that this financial statement was in any way fraudulent or incorrect. Nobody suggests that it is not in accordance with both Indonesian law and Indonesian accounting practices.

For these reasons, I conclude that it is clear beyond any shadow of a doubt that the export revenues flowing through the Cilacap, EXOR, and MUSI accounts were funds belonging to Pertamina which were subject to the restraining notices involved in this litigation. The matter indeed is not really complicated. The arguments of Pertamina and the government really made no showing of any substantial reason why this conclusion is not the right conclusion.

That concludes my ruling on the law, and we will now go to something else.

(Continued on next page)

[23]

SO ORDERED.

Dated: New York, New York
October 6, 2004

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

In The Matter Of:

KARAHA BODAS CO., L.L.C., v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI

Trial Volume 1
October 5, 2004

SOUTHERN DISTRICT REPORTERS, P.C.
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Original File 4A5AKARETXT, 165 Pages
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[Page 159]

Now, let me address the issue we are about. I think that the exhibits before me and the written materials establish that there was and is this BBM program. I think the materials establish that the operations of Pertamina were very largely in furtherance of that program and that the program was **[Page 160]** established by the government of Indonesia and Pertamina's operations in that program are pursuant to the laws of Indonesia, decrees, regulations, whatever. I think the materials before me establish that the sales that are at issue here, which yielded the funds that are now tied up, they came from what has been referred to as

non-BBM business. But I think the materials establish that this business was not totally outside the BBM framework but that what was done and what was intended, what was legally decreed is exactly what Pertamina and the ministry say, that the revenues from those sales were used, were in effect treated as BBM revenues so as to offset BBM costs. And the purpose of this was to have that type of application so as to ultimately determine the ultimate question. That is, for some period in question, and I'm not exactly sure whether the period is at the end of a month or the end of a year or the end of a quarter, but at the end of some period, it was intended and established by law that there would be a determination of whether Pertamina had made a profit or incurred a loss after taking into account all Pertamina's revenues, both from BBM sales and from non-BBM sales, and taking into account all of Pertamina's expenses. And those revenues and those expenses are reflected in the earnings statements of Pertamina. And they involve very, very large total amounts of money. I think the materials before me establish that if Pertamina incurred a loss, then the **[Page 161]** government of Indonesia in some way paid Pertamina to cover that loss. Now, I'm not entirely sure of that, because there is some evidence that the government may have made up the difference between the BBM price, the fixed price to the Indonesian consumers and the market price. So I'm not completely sure of exactly what occurred in connection with what I have just said. But the principle is really not different. Regardless of the exact mechanics, I think the evidence shows that the government was making up the loss.

Now, the weight of the evidence is that if Pertamina made a profit, then it had to pay the profit to the government, although there is some question about that that is

raised by a document introduced by KBC. But, again, for our ultimate question, in my view, that does *not* make a difference in the principle that we have to deal with.

So what I'm saying to you is that there is no reason, in my view, to introduce further evidence to support what I have said. I accept the idea that all of what I have said was done for the benefit of the Indonesian government and the Indonesian people, the Indonesian government representing the Indonesian people, that all of the activities of Pertamina were designed to further those governmental objectives. And I don't need to cite a great many specific instruments. There are plenty of governmental legal instruments which display what I have said, as far as I know.
[Page 162]

Now, what's the issue that remains? In my view, none of that solves the issue before the Court. And what I'm coming to now, of course, is in my view the controversy. The question, in my view, is, what is the effect of this circumstance? Pertamina was and is a company. Pertamina, even according to the documents most heavily relied on by Pertamina and the government, Pertamina for one thing had assets. This directive 105 has a section, section 3, about Pertamina's balance sheet, and it speaks of Pertamina's assets. It speaks of Pertamina's liabilities. Now, is the idea that these were assets but not assets? Were they something, was this a facade? Were these financial statements created with some hidden meaning that assets don't mean assets? These financial statements were undoubtedly used for many purposes by Pertamina, including getting financing in connection with its operations. Were they giving out these financial statements and having some hidden meaning? The financial statements have earning statements showing revenues of Pertamina, showing expenses of Per-

tamina. Were these not revenues of Pertamina? Were these financial statements which were undoubtedly given to companies relying on them, was there some hidden meaning so that revenues did not mean revenues of Pertamina and expenses did not mean expenses of Pertamina? Why does directive 105 talk about assets if there were no assets?

So, granted that at the end of some day, whether it's **[Page 163]** at the end of the month or the end of a quarter or the end of a year, granted that there was to be a reckoning so that there had to be a figuring of whether there was a profit or a loss to Pertamina, that profit and loss was figured on the basis of calculating the revenues of Pertamina versus the expenses of Pertamina. How else does one figure whether Pertamina has a profit or a loss? Now, if they weren't revenues of Pertamina, there would be a very odd accounting. I would not know quite what kind of an animal to call that. Then I suppose you would have to say, well, the costs were not the costs of Pertamina. They were simply the costs of the government. Then, why is the government figuring whether there's profit or a loss? It would be a very, very odd arrangement.

So the issue in my mind is this. While the revenues were coming in from these export sales and while they were going to Pertamina and while, as we discussed this morning, while they could be used as part of the funds to pay the obligations of Pertamina, while they could be used to back up contracts entered into by Pertamina, while Pertamina could spend that money, could put it in Pertamina's bank account, while all that was going on, is it or is it not the case that Pertamina, that it was Pertamina's money and that Pertamina could use it to pay any obligation that Pertamina had? Can it not be used to pay the obligation to

KBC? And if such money is restrained in a New York bank account or comes through a New **[Page 164]** York bank account, can it not be restrained to pay this obligation?

So what I'm trying to say is, most of what Pertamina and the republic have presented I accept. You do not need to spend any more time putting on evidence of that. What I do not accept without further exploration is a conclusion that because of those circumstances, Pertamina had no ownership interest in those funds and the government had the sole ownership of those funds. And that issue revolves, in my view, upon what occurred with respect to who had the ability to spend the money, how the money was accounted for in a financial statement, and so forth and so on. And none of that, those issues are not even touched by this discussion of the BBM arrangements and so forth.

So try to come back tomorrow and focus on these issues, and don't take time in having a lot of testimony about things which I really accept. So we'll see you at 10 o'clock tomorrow.

MR. SLATER: Thank you, your Honor.

(Adjourned at 10:00 a.m., Wednesday, October 6, 2004)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-MC-98 (TPG)

In the Matter of an Arbitration Between

Karaha Bodas Company, L.L.C.,

Petitioner,

—against—

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),

Respondent.

OPINION

The present motion is labeled a Motion for Turnover of Retention Fees Accrued Through November 2003. It was filed on April 6, 2004. It is another in a series of motions in the complex litigation about obtaining security for the payment of a judgment awarded to petitioner Karaha Bodas Company, L.L.C. ("KBC"). The background has been set forth in detail in prior rulings, the most recent of which was an opinion of this Court dated January 29, 2004. Only a summary will be presented now.

Background

KBC won an arbitration award against Pertamina in the amount of $261.1 million. On the basis of this award, judg-

ment was entered for the $261.1 million in the United States District Court for the Southern District of Texas. Pertamina appealed to the Fifth Circuit. However, Pertamina declined to file a supersedeas bond and therefore there was no stay of execution. This circumstance led to litigation in this Court and other courts, in which KBC has sought to restrain funds belonging to Pertamina.

As of the time of the January 29, 2004 opinion, Pertamina's appeal had not been decided. However, on March 23, 2004 the Fifth Circuit affirmed the lower court judgment. Pertamina has stated that it intends to apply for certiorari to the United States Supreme Court.

The litigation in the Southern District of New York results from the fact that KBC has served restraining notices on Bank of America and the Bank of New York pursuant to N.Y. C.P.L.R. § 5222. The notices were served on February 22, 2002 and placed restraints upon a total of twenty-four trust accounts held in Pertamina's name at the two banks. These trust accounts receive proceeds from the marketing of oil and gas products. Twenty-two of the accounts are at Bank of America and two are at the Bank of New York.

Soon after service of the restraining notices, the issue was raised by Pertamina and the Republic of Indonesia as to how much of the funds in the trust accounts actually belongs to Pertamina, and how much belong to the Republic. KBC can, of course, only execute on property of Pertamina. This has led to a remarkably voluminous amount of motion practice in the District Court and applications for review in the Court of Appeals. Even more remarkable is the fact that, as of the present time, the only trust accounts as to which property rights have even been partly decided after fifteen accounts at Bank of America. As to the other nine accounts, an initial motion is still being briefed. The fifteen account are spoken of as the

"Adjudicated Accounts," and the other nine are referred to as the "Unadjudicated Accounts."

The District Court, as affirmed by the Court of Appeals, has ruled that Pertamina did not own all of the funds passing into the Adjudicated Accounts, although they were all in the name of Pertamina. However, Pertamina did own, and does own, that portion of the funds constituting the "Retention Fees." As explained in prior rulings, these Retention Fees are 5% of Net Operating Income, or about 5/65 of the total funds passing into the accounts.

Pertamina and the Republic sought to limit the amount of the Retention Fees subject to the restraining notices by contending that the effect of the restraining notices as to the Adjudicated Accounts ceased in June 2002, rather than continuing through that year and thereafter, as argued by KBC. This issue was raised in certain motions which were made, briefed, and argued in the year 2003. In the opinion of January 29, 2004 the Court held that the effect of the restraining notices did not terminate in June 2002, but continued through 2002 and into 2003, and would continue, until the amount of the judgment plus interest was secured.

The Current Motion

The motions referred to above dealt with how long the restraining notices were effective as to the Retention Fees. For reasons to be explained, a new issue has now been raised by Pertamina and the Republic, leading to the current motion. This motion results from the fact that Pertamina and the Republic *now* take the position that *no Retention Fees* were even earned by Pertamina commencing January 1, 2003, so that there were no additional funds in the Adjudicated Accounts subject to restraint beginning on that date.

Pivotal to current motion is a letter of November 21, 2003 from the Ministry of Finance of the Republic to the Governor of the Bank of Indonesia, terminating the payment of Retention Fees to Pertamina.

Pertamina and the Republic take the position that this letter was merely confirmation of prior legal enactments which had already terminated the Retention Fees as of January 1, 2003. KBC concedes that the Retention Fees were ended by that letter, but vigorously opposes the idea that this occurred at any time before the letter.

These contrary positions form the issues raised in KBC's present motion for turnover of Retention Fees accrued in the Adjudicated Accounts through November 2003. The outcome of this motion makes a substantial difference. As of December 31, 2002 the amount of the Retention Fees restrained in the Adjudicated Accounts was $178 million, not enough to secure the judgment plus interest, which currently totals approximately $297 million. KBC contends that another $132 million in Retention Fees was restrained in the Adjudicated Accounts between January 1 and November 21, 2003, bringing the total of restrained funds in the Adjudicated Accounts to $310 million, which is in fact sufficient to secure the judgment plus interest.

The Evidence

The issues would be quite straightforward, although not entirely simple, if Pertamina and the Republic conceded that the Retention Fees were lawfully paid to Pertamina until the time of the November 21, 2003 letter and that there was no official act cancelling the Retention Fees until that letter. But, far from making such a concession, Pertamina and the Republic contend that the governing legal provisions which

existed even before the November 21, 2003 terminated the Retention Fees as of January 1, 2003. Pertamina and the Republic concede that about $132 million in Retention Fees was paid to Pertamina between January 1 and November 21, 2003. However, as the Republic puts it, these amounts were only "nominally distributed"—were only "provisionally paid"—to Pertamina. Pertamina goes so far as to state that, "Any remittance of funds to Pertamina after January 1, 2003 as a Retention Fee has been improper."

However, these positions are diametrically opposite to what was asserted by Pertamina and the Republic in earlier motions. The subject of Retention Fees for 2003 was a prominent feature of the various motions that were filed between February 14, 2003 and June 27, 2003, and that were decided in the opinion of January 29, 2004. These will occasionally be referred to as "the 2003 motions." The Republic filed *another* motion addressed to the Unadjudicated Accounts in November 2003. This motion has not yet been fully briefed.

The written submissions and hearings on the 2003 motions all occurred before November 21, 2003, the date of the letter referred to above. All of the factual presentations and the arguments on these motions *had as their premise* that the Retention Fees were still in effect and were being earned by Pertamina in 2003. No argument was made—not even a suggestion was voiced—remotely resembling the current contention of Pertamina and the Republic that as of January 1, 2003 Pertamina's right to Retention Fees was ended. The issues in these motions was whether the restraining notices were still effective to reach these *ongoing* Retention Fees.

Many citations to the record on the 2003 motions could be made, showing that all parties viewed Pertamina as having a continuing right, in the year 2003, to receive the Retention

Fees. This was what was categorically represented to the Court. A few examples are here set forth.

At the hearing of August 27, 2003 the attorney for Pertamina stated that Retention Fees were accruing to Pertamina currently at the rate of about $10 million per month (Tr. 32). The attorney spoke of "prospective accrual of Retention Fees going forward" (Tr. 35), and stated that the Retention Fees "are amounts that continue to accrue over time" (Tr. 45). The attorney for the Republic spoke of the Retention Fees in the Unadjudicated Accounts as accumulating "from February 22 [2002] until the present time" (Tr. 49). The Republic's attorney stated that the Retention Fees had been reduced somewhat, but said that she did not have a calculation of such reduction (Tr. 31-32). In response to extensive questions by the Court as to the current status of the Retention Fees, and the continued buildup of Retention Fees in the various accounts, there was no hint from the attorneys for Pertamina or the Republic that such fees ceased as of January 1, 2003. The whole tenor of the discussion was flatly to the contrary.

In various presentations to the Court, Pertamina and the Republic have relied on declarations filed by Sahala L. Gaol and Bambang Yuwono. Sahala is with the Ministry of Finance of the Republic, and Yuwono is with a new Indonesian entity dealing with oil and gas business, known as BP Migas.

In connection with the 2003 motions, Sahala submitted a declaration dated May 9, 2003 in which he presented a detailed description of how the Retention Fees are calculated. He spoke in the present tense. There was no suggestion that, as of the time of his declaration, over four months into the year 2003, the Retention Fees no longer existed. Sahala filed a subsequent declaration dated July 31, 2003. This declaration referred to Government Regulation 41 of 1982, which was the legal provision giving Pertamina the right to the

Retention Fees. According to Sahala, this regulation was fully effective as of the time of his declarations, although the amount of the Retention Fees had been reduced. Sahala stated:

> 6. In accordance with Government Regulation 41 of 1982, as of December 16, 1982, the Ministry of Finance, through Bank Indonesia in Jakarta, pays Pertamina only 5/65 of the amount deposited in the Pertamina account at Bank of America as its Retention Fee. The Ministry of Finance no longer pays Pertamina the remainder of the Retention Fee from the tax payments.

The last sentence of the quotation refers to the fact that companies engaged with Pertamina in the sale of products were obligated to pay taxes to Indonesia, and that originally Pertamina was paid 5/65 of such taxes as *part* of its Retention Fees. Apparently as of the beginning of 2003 that portion of the Retention Fees were no longer paid. But, according to Sahala, the Retention Fees continued after January 1, 2003 despite the reduction in the amount.

Yuwono submitted a declaration dated May 6, 2003. This declaration contains a detailed description of how Net Operating Income is calculated and how Pertamina's Retention Fees are arrived at as 5% of NOI. The declaration presents an illustration of how the calculations are to be made, based upon certain 2002 figures. But the description portrays the Retention Fees as ongoing, and there is no suggestion that they terminated at the end of 2002. It should be noted that Yuwono spoke of the entity, BP Migas, as a Government agency with various responsibilities for managing the Production Sharing Contracts in which Pertamina was involved.

The legal enactments that established BP Migas in 2002, and which are themselves not set forth in the May 6 Yuwono declaration, will be discussed later. But there was no suggestion that BP Migas had assumed a role as of January 1, 2003 that deprived Pertamina of its Retention Fees, as is *now* contended on the present motion. Yuwono submitted a second declaration dated August 5, 2003. Certain additional details are presented about how Net Operating Income is calculated. The declaration specifically refers (para. 22) to the fact that Pertamina's Retention Fees are still being earned, although they had been reduced.

Submissions on the Current Motion

In connection with the present motion, Pertamina and the Republic refer to certain Indonesian laws, decrees, and regulations, which they contend had the effect of terminating Pertamina's right to Retention Fees as of January 1, 2003. Some of these were enacted or promulgated before the January 1, 2003 date. Another decree, dated June 26, 2003, is relied on as confirming that, effective January 1, 2003, Pertamina's Retention Fees were over with. Of course, Pertamina and the Republic refer to the letter of November 21, 2003 from the Ministry of Finance to the Governor of the Bank of Indonesia, already described above. But it is the contention of Pertamina and the Republic that the November 21, 2003 letter merely confirmed what prior legal enactments had already provided—*i.e.*, the termination of the Retention Fees as of January 1, 2003.

There is a startling anomaly in the fact that in the various submissions and arguments in connection with the 2003 motions, the attorneys for Pertamina and the Republic never mentioned the laws, decrees and regulations now relied upon as cancelling the Retention Fees. Every one of these laws,

decrees, and regulations existed at the time of the 2003 submissions and arguments. In particular, the June 26, 2003 decree, which Pertamina and the Republic now point to as the enactment that cancels the Retention Fees, was in existence at the time of both the July 31 Sahala declaration, and the August 5 Yuwono declaration. Nonetheless, both of these declarations specifically represented that the Retention Fees were ongoing at the time.

Indeed, if the Retention Fees had in fact ended as of January 2003, this circumstance would have been of the utmost relevance to the 2003 motions. There would have been no need to worry about whether the effect of the restraining notices on the Retention Fees extended into 2003, if the Retention Fees did not exist to be restrained.

No one would suggest that the highly qualified attorneys for Pertamina and the Republic were not fully informed about the relevant Indonesian law. Of course, they were. But quite obviously they concluded that the Retention Fees *did not* terminate as of January 1, 2003, and that Pertamina was fully entitled to such fees after this date, although somewhat reduced in amount.

The inevitable conclusion is that the cancellation of the Retention Fees came with the November 21, 2003 letter, and not before. What was presented in the various arguments and statements of position prior to the time of November 21, 2003 letter was that the Retention Fees were still in effect.

It is necessary to summarize the legal provisions now relied upon by Pertamina and the Republic.

For some years Pertamina has been a state-owned company involved in the exploitation of Indonesia's oil and gas resources. In a law enacted in 2001 ("Law 22/2001"), a new framework for oil and gas activities in Indonesia was established. Pertamina was to be phased out of its role, and ulti-

mately to be converted into a private company. Law 22/2001 provided for the creation of a new entity, "BP Migas," to take over certain of Pertamina's rights and responsibilities.

BP Migas was actually established on July 16, 2002 pursuant to Government Regulation 42 of 2002 ("GR 42/2002"). GR 42/2002 contains provisions about the transition from Pertamina to BP Migas. Contract documents were to be surrendered to BP Migas within six months. Certain Pertamina employees would be transferred to BP Migas within one year. Through the end of 2002 the operational costs of BP Migas were to be charged to Pertamina and Pertamina was to receive fees during such period for supervisory services. However, there was no provision giving a definite termination date for the business Pertamina was then carrying on or any provision terminating the Retention Fees. Surely there was nothing in GR 42/2002 which terminated the Retention Fees as of January 1, 2003. In fact, as already described, the Retention Fees were *not* ended as of that date, but was in reality confirmed as continuing past that date by virtue of the reduction in the amount of the Retention Fees.

The Ministry of Finance promulgated a decree on June 26, 2003 denominated Decree No. 295/KMK.06/2003. Decree No. 295 provided that, effective January 1, 2003, BP Migas was to receive income from the Government amounting to 1% of the income the Government received from the oil and gas resources. Decree No. 295 did not provide for a halt to the activities that *Pertamina* had been performing nor did it state that the Retention Fees were terminated.

Pertamina and the Republic have provided a declaration of Sahala, dated February 13, 2004, to summarize the above legal provisions. After describing the provisions, Sahala states:

> 6. The end-result of these regulations and decrees is that Pertamina's Retention Fee as it is defined in Article 5(1) of Government Regulation No. 41 of 1982 is no longer effective.

This statement speaks, of course, as of the date of the declaration, February 13, 2004, and does not in any way state that the Retention Fees ended on January 1, 2003. In fact, the Sahala declaration relies on the letter of November 21, 2003 as the directive which terminated the Retention Fees. It is noteworthy that the Sahala declarations of May 9, 2003 and July 31, 2003, submitted in connection with the 2003 motions, made no mention of the legal enactments described in his declaration of February 13, 2004, submitted on the new motion. In fairness to Sahala, it must be repeated that he does not claim that the legal provisions issued prior to the November 21, 2003 letter contained anything cancelling the Retention Fees, although counsel for Pertamina and the Republic attempt to construe his declaration as supporting such a conclusion.

It is abundantly clear that the cancellation of the Retention Fees did not occur before the November 21, 2003 letter from the Ministry of Finance to the Governor of the Bank of Indonesia dated November 21, 2003. It is appropriate to quote this letter in full:

> In relation to the implementation of Law Number 22 of 2001 regarding Oil & Gas and the issuance of Government Regulation Number 42 of 2002 regarding the Implementing Body of Upstream Business Activities in Oil & Gas dated July 26, 2002 it is hereby stated as follows:

1. Pursuant to article 27 of the Government Regulation No. 42 of 2002 it is regulated that:
   a. Until end of the year 2002, operating expenses of the Implementing Body shall be charged to Pertamina's budget.
   b. For charging of operating expenses of the Implementing Body as referred to in item a, Pertamina shall still be provided with compensation in term of fees for guidance and supervision to Production Sharing Contract contractor for relevant term.
2. In connection with the provision of the Government Regulation mentioned in point (1) above, starting from January 1, 2003 the operating expenses of the Implementing Body shall not be charged to Pertamina's budget and since that period, Pertamina will no longer be entitled to the compensation of retention (fee) as it has been applied before.
3. In regard to the provision of point (2) above, we request you to stop immediately the payment of retention (fee) to Pertamina. Accordingly, all of our previous correspondences to Bank Indonesia related to the payment of retention (Pertamina portion) from each export revenues of Pertamina and the contractor payment in term of Production Sharing Contract, shall be declared void.

Paragraph 3 of the letter requests Bank of Indonesia "to stop immediately the payment of retention (fee) to Pertamina." No prior legal enactment has been cited containing a statement

that Pertamina was no longer entitled to Retention Fees and directing that payment of such fees should stop.

Paragraph 2 states that "starting from January 1, 2003 the operating expenses of the Implementing Body [BP Migas] shall not be charged to Pertamina's budget and since that period, Pertamina will no longer be entitled to the compensation of retention (fee) as it has been applied before." This language might be read as raising the issue of retroactivity. However, there is no actual statement that Retention Fees, paid since January 1, 2003, are retroactively cancelled. If there had been such a provision, there would be a most serious question as to whether such an attempt at retroactivity could affect the rights of KBC under its restraining notices. However, Pertamina and the Republic do not argue that the letter had such retroactive effect, nor that the letter itself had any force of law. Their argument is that the pre-existing legal provisions prospectively terminated the Retention Fees as of January 1, 2003. As already stated, the Court rejects this argument.

Pertamina and the Republic attempt to characterize the Retention Fees paid in 2003 as "nominal," "provisional," or simply "improper." No suggestion of such a status was made during the lengthy discussions of Retention Fees in connection with the 2003 motions. The Court rejects the current attempt to re-characterize the Retention Fees.

An issue has been raised about whether the Retention Fees paid in 2003 were or were not "repaid." A declaration of Sahala dated April 26, 2004 states that as of December 22, 2003, based on a "preliminary reconciliation," Pertamina was directed to repay $117 million from Retention Fees received from January through September 2003. Sahala was recently deposed, and testified that he did not know whether or not such repayment had actually been made. Yuwono's deposi-

tion was basically to the same effect. In any event, if repayment was demanded, and even if it was or is made, this does not take away from the fact that Retention Fees were paid in 2003 and were subject to the restraints imposed under New York law.

The Court is constrained to comment upon a strange circumstance relating to the November 21, 2003 letter and other events in November 2003. As indicated earlier, in November 2003 the Republic filed a motion to release funds belonging to the Republic from the Unadjudicated Accounts. That motion has not been fully briefed, but certain features of it are of interest on the present motion before the Court. Among the submissions in support of the November 2003 motion was an opinion of an Indonesian attorney, Dr. Sudargo Gautama, dated November 6, 2003. The Republic's memorandum in support of that motion was dated November 12, 2003.

The opinion of Dr. Gautama has now also been submitted in support of the position taken by Pertamina and the Republic on the current motion.

In the various submissions by the Republic on the different motions, it was the November 6 opinion of Gautama that first described the series of legal enactments, now relied upon by Pertamina and the Republic in the current motion for the proposition that the Retention Fees paid to Pertamina ended as of January 1, 2003. The Guatama opinion was to the effect that the new laws had the effect of contradicting the former law (Government Regulation 41 of 1982) which gave Pertamina the right to the Retention Fees. Gautama described how the new laws established the entity BP Migas, provided for a transfer of responsibilities from Pertamina to BP Migas, and provided for the compensation of BP Migas. The conclusion of Dr. Guatama was:

> As noted above, the Retention Fee set forth in Article 5(1) of Government Regulation 41/1982 is no longer effective.

Of course, Guatama spoke in the present time, as of November 6, 2003. His opinion cited no specific provision of law terminating the Retention Fees as of January 1, 2003 or as of any other date. It must be repeated that this recitation of the new laws was not contained in the submissions in connection with what has been referred to as the 2003 motions.

The Republic, in its memorandum of November 12, 2003, made use of the Guatama opinion. However, the memorandum did not take the position that the effect of the legal enactments was actually to terminate the Retention Fees. The memorandum asserted (p. 6) that as of November 2003, the Retention Fees were still being paid and *could be restrained.* The effort of the Republic was to portray *the amount* of the restrained 2003 Retention Fees as relatively small—about $12 million—with regard to the Unadjudicated Accounts in question.

It would seem no coincidence that in a matter of days the Ministry of Finance issued the November 21, 2003 letter, which concededly did cut off the Retention Fees. Although one cannot be certain, it may very well be that the Republic was step-by-step reassessing its strategy in relation to the restraints in New York, which had been placed upon very large amounts of money. Ultimately that strategy resulted in the radical change of position manifested in the current motion. The Republic, along with Pertamina, now asserts that the Retention Fees were ended as of January 1, 2003. As described earlier in detail, this is something that was never even suggested in the 2003 motions, and it was not argued in the memorandum filed by the Republic on its other motion

shortly before the appearance of the November 21, 2003 letter.

All of this reinforces the conclusion of the Court that the Retention Fees were in effect until November 21, 2003.

Conclusion

Obviously there was, pursuant to arrangements lawfully enacted, a transfer of responsibility from Pertamina to BP Migas. However, that involved a transition over a period of time. Exactly what the stages were in this transition in 2001, 2002, and 2003, the record does not show nor does it need to show. The sole issue before the Court is whether Pertamina was earning, and was entitled to earn, the Retention Fees commencing with the service of the restraining notices on February 22, 2002 and continuing until the admitted end of the Retention Fees on November 21, 2003. Conclusive evidence that this was in fact the case is provided by the positions taken by Pertamina and the Republic and their experts—all asserted repeatedly and with deliberation—during the presentation of the "2003 motions," and even in the November 2003 motion about the Unadjudicated Accounts. The attempt to switch to a totally contrary position in connection with the present motion has unfortunately put Pertamina and the Republic in a position in which their arguments cannot be given weight. It is surely no small problem that, in connection with the current motion, legal enactments are now brought to the surface, which existed and would have been highly germane on the 2003 motions, if these legal enactments in fact provided what is now argued. But they *do not*. And the best evidence of this is the interpretations made by Pertamina and the Republic themselves, as well as their experts, in the earlier submissions.

The motion of KBC is granted to the extent that the Court finds that Pertamina had a right to collect Retention Fees on the Adjudicated Accounts during the entire period of February 22, 2002 until November 21, 2003. In order to eliminate the need for further litigation, the Court finds, on the basis of the record, that the amount of those fees in 2003 was $132 million, in addition to the $178 million restrained in 2002. The fees were restrained in the manner described in the Court's opinion of January 29, 2004.

The Court will not direct an actual turnover. The funds will remain at Bank of America under conditions heretofore specified.

KBC requests certification for immediate appeal of the rulings in the January 29, 2004 opinion and in this opinion. The Court grants this application.

The parties will settle an appropriate order.

SO ORDERED.

Dated: New York, New York
May 19, 2004

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 21 MC 98 (TPG)

IN THE MATTER OF AN ARBITRATION BETWEEN

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

—against—

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA ("PERTAMINA"),

Respondent.

ORDER

Further to this Court's Opinion dated January 29, 2004, and in order to maintain sufficient security for the judgment obtained by Karaha Bodas Company ("KBC") against Pertamina, as well as to release to the Ministry of Finance of the Republic of Indonesia funds not required for such security, but without prejudice to the rights of any parties going forward in this litigation, it is hereby ORDERED:

1. This Order pertains to the funds restrained pursuant to Restraining Notices issued by this Court on February 22, 2002 to Bank of America and The Bank of New York, and thereafter extended from time to time, most recently on March 4, 2004.

2. Subject to the terms and conditions of this Order, Bank of America and The Bank of New York shall release to the Ministry of Finance of the Republic of Indonesia all funds currently withheld except the amounts now held at Bank of America in the 15 adjudicated trust accounts at that bank set forth on Schedule 1 hereto (the "Adjudicated Accounts"), and no additional amounts shall hereafter be withheld by either bank, except that Bank of America shall withhold such amounts as are required from time to time to true up the interest component of KBC's judgment against Pertamina entered December 4, 2001 in the United States District Court for the Southern District of Texas (the "Texas Judgment").

3. The funds so held in the Adjudicated Accounts shall be treated as security for such amounts, if any, as are finally held in further proceedings in this Court and on appeal to belong to Pertamina and to be subject to execution against Pertamina, from among the funds that passed into the accounts listed in Schedules 1, 2, and 3 at Bank of America or The Bank of New York since February 22, 2002. Although the parties disagree as to the past effect of the restraining notices, the parties agree that the restraining notices will be effective from the date of this order going forward.

4. The Court will now proceed to complete its determination, subject to appeal, as to what funds that have passed and will pass into the

accounts listed in Schedules 1, 2, and 3 are funds belonging to Pertamina and subject to the restraints versus funds belonging to the Ministry of Finance or otherwise not subject to the restraints. In these further proceedings the Court will determine the effect of Indonesian law on the respective property interests as such law stands as of the data of entry of this order. The purpose of the latter clause is understood to be directed solely at possible changes that would diminish KBC's right.

5. At the same time the Court awaits the conclusion of proceedings regarding the Texas Judgment. The exact sequence of the proceedings cannot be known at this time. However, if the Texas Judgment is finally affirmed, the amount held in the Adjudicated Accounts will be paid to KBC to the extent that it is finally determined that funds passing through the accounts listed in Schedules 1, 2, and 3, which belong to Pertamina and are subject to the restraints, are at least equal to the amount of the Texas Judgment plus interest. If it is determined that the amount belonging to Pertamina and subject to the restraints is less than the amount of the Texas Judgment plus interest, the difference will be paid to the Ministry of Finance. If the Texas Judgment is finally reversed or vacated, or the amount reduced, this will be given effect in determining the ultimate allocation and payment of the funds held in the Adjudicated Accounts. In the event that the Texas Judgment is finally reversed or vacated in its entirety, the Restraining Notices shall be dissolved and be of no further force and effect.

6. Any funds paid to the Ministry of Finance shall be paid to the Ministry's foreign exchange account at the Federal Reserve Bank of New York.

7. The Restraining Notices may be extended hereafter but only subject to the terms and conditions specified in this Order.

Dated: March 18, 2004

/s/ THOMAS P. GRIESA
Hon. Thomas P. Griesa
United States District Judge

Schedule 1

ARUN II Trust
ARUN III Trust
Bontang Excess Sales MCGC Trust
Bontang Excess Sales AQP Trust
Bontang Excess Sales Korea II Trust
Bontang Excess Sales KCO Trust
Bontang LPG PKG V Trust
Bontang LPG PKG VII Trust
Bontang II Trust
Bontang III Trust
Bontang IV Trust
Bontang V Trust
Bontang VI Trust
East Java Pipeline (PSC Revenue) Trust
ONWJ Trust

Schedule 2

BLRE Trust
Corridor Trust
East Java Pipeline (Throughput Fee) Trust
KMI Trust
South Sumatra Trust
West Natuna Trust

Schedule 3

Cilacap Trust
Exor I Trust
MUSI II Trust

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-18-302 (TPG)

In the Matter of an Arbitration Between

Karaha Bodas Company, L.L.C.,

Petitioner,

—against—

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),

Respondent.

OPINION

On February 14, 2003 petitioner Karaha Bodas Company L.L.C. ("KBC") filed a motion seeking an order (1) directing Bank of America to transfer to KBC approximately $266 million, which was being held in certain accounts pursuant to a restraining notice; and 2) directing Bank of America to transfer to KBC certain additional funds on a monthly basis. Respondent Pertamina opposes the motion. The Ministry of Finance of the Republic of Indonesia ("the Republic") has been permitted to participate in this proceeding as a "Non-Party with Interest." The Republic also opposes the motion.

Almost simultaneously with the above motion, Pertamina filed a motion to stay execution, contending that the court should hold the proceedings brought by KBC in abeyance

pending the outcome of the underlying litigation then pending in the Fifth Circuit and the outcome of a certiorari petition to the Supreme Court from a Second Circuit decision dealing with the funds held at Bank of America.[1]

On April 28, 2003 the Republic filed a motion seeking the release of approximately $262 million from Bank of America accounts, claiming that those funds belonged to the Republic of Indonesia and could no longer be restrained.

At a hearing held on May 23, 2003 the court decided certain issues raised by KBC's February motion and the Republic's April motion, but left certain issues for further consideration. No funds were actually turned over or released.

On June 27, 2003 KBC filed a new motion, which in effect replaced KBC's February 2003 motion. The new motion refined the issues dealing with KBC's rights in funds held by Bank of America and funds passing through Bank of America, and requested an order requiring Bank of America to turn funds over to KBC.

Facts

KBC is a corporation located in the Cayman Islands with its center of operations in the United States. Pertamina is an Indonesian state-owned oil and gas company. KBC and Pertamina entered into contracts in 1994 for a joint venture involving the development of facilities in the Karaha area of West Java. In 1997 the projects were suspended as a result of Indonesian government decrees. This termination of operations led KBC to seek arbitration in Switzerland for breach of contract by Pertamina.

On December 18, 2000 the arbitral panel made an award of $261.1 million to KBC against Pertamina. On December

[1] Certiorari has since been denied.

4, 2001 the award was confirmed by the U.S. District Court for the Southern District of Texas, and judgment was entered in that court for $261.1 million. Pertamina has appealed that judgment to the Fifth Circuit, and that appeal is still pending. Pertamina declined to file a supersedeas bond under Fed. R. Civ. P. 62(d), and therefore there is no stay of execution.

Wholly apart from the contracts with KBC, Pertamina's business activities involved the marketing of oil and gas products. It had at times carried this out through joint ventures with private contractors, pursuant to agreements known as Production Sharing Contracts. The sales proceeds of some of these ventures were channeled through trust accounts held in Pertamina's name at Bank of America and the Bank of New York. A total of twenty-four such accounts are at issue in this proceeding.

The court has heard extensive evidence regarding fifteen of these accounts, all at Bank of America, now referred to as the "adjudicated accounts." These bear the names of the joint venture projects in Indonesia.

- Arun III
- Bes MCGC
- Bontang V
- Bontang VI
- Arun II
- Bes AQP
- Bontang II
- BLPG PKG V
- BLPG PKG VII
- BES Korea II
- BES KCO
- Bontang III
- Bontang IV
- East Java
- ONWJ

An additional nine accounts are also the subject of this proceeding. Seven of these are at Bank of America:

- West Natuna
- Corridor
- KMI
- CILACAP
- East Java Thruput Fee
- South Sumatra
- BLRE

Two are at the Bank of New York:

- MUSI II Trust
- EXOR I Trust

The issues dealt with in this opinion relate only to the Bank of America accounts. The Bank of New York accounts will not be referred to hereafter.

As already indicated, the evidence regarding the adjudicated accounts shows that they are trust accounts containing revenues generated from Production Sharing Contracts. The revenues enter the trust accounts in Pertamina's name. However, pursuant to Pertamina's standing instructions, upon receipt of these revenues, Bank of America, as trustee, makes certain payments. The payments cover operational expenses incurred by the joint venture, as well as expenses incurred by the joint venturer and the share of the profit owed to the joint venturer. What is left over after these payments is a balance to be paid to Pertamina. This balance will be referred to hereafter as "the amount payable to Pertamina." For reasons that will be explained hereafter, there has been extensive litigation in this court regarding how much of the money payable to Pertamina actually belongs to Pertamina, as opposed to the Republic of Indonesia.

On February 22, 2002 the Texas judgment was registered in the Southern District of New York. Restraining notices were issued pursuant to N.Y. C.P.L.R. § 5222, one of which was served on Bank of America. Bank of America complied with the restraining notice by placing in escrow the funds payable to Pertamina from all twenty-two of the trust accounts discussed above that were located at the Bank.

The Republic moved to quash the restraining notices, asserting that it owned all of the restrained funds, that the judgment debtor Pertamina owned none of the funds, and therefore that KBC had no right to restrain any of the funds. KBC opposed the motion, taking the view that Pertamina owned all of the funds in question and that all were subject to restraint. On April 5, 2002 the court issued a bench ruling embodied in an order dated April 24, 2002. The court dealt only with the 15 "unadjudicated accounts" and made no decision regarding the others. The court determined that Pertamina had a property right in the adjudicated accounts "to the extent of its five percent (5%) Retention Fee, which can be executed upon in the manner allowed under New York C.P.L.R. 5222(b)." The court also determined that under Indonesian law the Retention Fee was equal to 5% of Net Operating Income generated from each Production Sharing Contract. The court held that the remaining funds payable to Pertamina were owned by the Republic of Indonesia, and that the accounts could not be executed upon to the extent of the Republic's portion. Enforcement of these provisions of the April 24 order was stayed, however, to allow for review by the Court of Appeals.

All parties sought leave to appeal the court's order. KBC sought reversal of the court's determination that only 5% of the Net Operating Income was owned by Pertamina. Perta-

mina and the Republic appealed, objecting to a ruling that as much as 5% belonged to Pertamina.

On June 7, 2002 the total amount restrained by Bank of America reached $546 million, or approximately twice the amount of the judgment plus interest—*i.e.*, $503 million in the adjudicated accounts and $43 million in the remaining seven accounts. It appears that at that point the Bank stopped restraining additional payments into the adjudicated accounts. According to the record before the court, Bank of America acted on its own. There was no court order and no court determination regarding any issues under C.P.L.R. § 5222(b).

On June 18, 2002 the Court of Appeals granted all motions for leave to appeal, and issued an order modifying the District Court's restraint. The Court of Appeals stated:

> Because Bodas also has a substantial possibility of success on the merits, we conclude that the district court did not abuse its discretion. However, we modify the stay to apply only to sufficient funds to satisfy the judgment, because no legitimate interests are served by tying up funds beyond what would be necessary to make Bodas whole if it prevails on appeal.

Bank of America then undertook to give effect to the Court of Appeals order. The Bank took the total amount restrained in the adjudicated accounts as of June 7, 2002 ($503,441,910.86) and subtracted the amount of KBC's judgment, plus interest as of June 7 ($276,633,524.59). This left an amount to be disbursed out of the $503 million of $228,808,386.23. Bank of America then deducted from this amount legal fees of $249,817.02 and added interest from June 7 of $260,727.35, giving a net to be released out of the adjudicated accounts on June 19 of $226,819,296.59.

Robert Braun of Bank of America states that no other funds have been restrained in the fifteen adjudicated accounts beyond the $276,663,524.59 (which will be referred to hereafter as $277 million) except to cover the 4% interest accruing on the judgment. At a November 12, 2003 hearing the amount restrained from the adjudicated accounts was estimated by the Republic's lawyers to be approximately $290 million.

The Court of Appeals order of June 18 did not affect the seven other Bank of America accounts. Thus the $43 million remained on hold, and Bank of America resumed withholding amounts coming into these accounts. The total amount withheld reached almost $290 million as of June 2003. At this time Bank of America ceased withholding further amounts from the seven accounts.

On December 10, 2002 the Court of Appeals affirmed the District Court's April 24 order, stating:

> The district court correctly adjudicated the relative ownership interests of the Republic of Indonesia and Pertamina. We therefore affirm the district court's order granting KBC's motion to attach the Retention and denying KBC's motion to attach the remainder of the disputed funds. Because this is not an appeal from a final judgment, proceedings in the district court will presumably move on to other matters. We direct the district court, in the course of those proceedings, to continue the stay presently in force or to substitute one similar until such time as the parties' rights to the disputed funds are finally determined.

Karaha Bodas Co. v. Pertamina, 313 F.3d 70, 92-93 (2d Cir. 2002). Thus the Court of Appeals held that Pertamina had ownership rights only as to the Retention Fee, and that the

Republic was the owner of the rest of the funds, although they were nominally payable to Pertamina.

In the various proceedings before this court, it has been necessary to determine what fractional portion of the funds payable to Pertamina comprised the Retention Fee. It should be recalled that it was the funds payable to Pertamina (arrived at after deducting various amounts described earlier in this opinion) which were restrained by Bank of America. The Retention Fee has been spoken of as 5% of Net Operating Income. This is correct. But Net Operating Income is not synonymous with the funds payable to Pertamina. In order to arrive at the latter amount, the sum payable to the joint venturer is deducted from Net Operating Income. The Court of Appeals has set forth a useful illustration of what occurs. In the following quotation "PSC Revenue" actually means Net Operating Income.

> For instance, if the PSC Revenue were $100, Pertamina's retention would be $5, or five percent. Under the terms described in Pertamina's annual reports, though, the PSC Revenue would be divided: $35 would go to the PSC Contractor, and $65 would go to Pertamina in New York, then be transferred immediately to the Ministry in Jakarta. Once the $65 reached Jakarta, Pertamina would receive $5. After taxes and dividends, however, Pertamina would only retain $1.

Id. at 84 n.13. The concept embodied in the quoted footnote has been used frequently by the parties and the District Court in proceedings following the Court of Appeals ruling. In the illustration used in the Court of Appeals footnote, when Net Operating Income ($100) is reduced by the $35 payable to the joint venturer, this leaves $65, which is the

amount payable to Pertamina. Pertamina's Retention Fee is $5 out of this $65, or 5/65 of the amount payable to Pertamina.[2]

In February and April of 2003, KBC, Pertamina, and the Republic filed three of the motions with which this opinion is concerned, addressing issues related to exactly how much money held by Bank of America was subject to execution by KBC. The court held oral argument on the three motions at a hearing on May 23, 2003.

One of the issues related to the proper method for calculating Net Operating Income, and was resolved in a bench ruling. It had been agreed that Net Operating Income was arrived at after deducting expenses of the joint venture. What was still in dispute was whether expenses of the joint venturer should also be deducted in calculating Net Operating Income. The court ruled that they should.

Also discussed at the May 23 hearing was a broader issue about the extent of KBC's rights. The Republic took the position that no further Retention Fees passing into the adjudicated accounts after June 9, 2002 were subject to restraint and that the total of the Retention Fees restrained was about $20 million. KBC contended that the restraint continued to apply after June 9 and would so continue until the amount of the restrained fees reached the amount of $277 million plus interest.

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[2] In certain recent submissions the parties have alluded to the possibility that a slightly different method of calculation has been used. But these suggestions have not thus far been presented in sufficiently cogent fashion for the court to base any finding on. Consequently for purposes of this opinion, the court will make use of the method of calculation illustrated by the Court of Appeals. In any event, any changes in the *method of calculating* the Retention Fee, while perhaps resulting in adjustments in the figures, will not alter what the court is saying about the Retention Fee *in principle*.

At the hearing of May 23, 2003 the court deferred decision on this issue, but took the view that, at least prospectively, there should be no doubt that Retention Fees flowing into the adjudicated accounts were subject to restraint up to the entire amount specified by the Court of Appeals as necessary to secure the judgment. This was embodied in an order of May 30, 2003, which provided that "beginning now and from this time forward, the restrained funds [the $277 million plus interest] will be considered security for all Retentions earned by Pertamina in connection with the projects involved in the accounts subject to the stay. The amounts of such Retentions will be subject to findings by the court on presentation of appropriate evidence." The court invited KBC to make a new motion addressing these matters. KBC filed such a motion on June 27, 2003.

The Republic sought to appeal or to obtain a writ of mandamus regarding the May 30, 2003 order. On December 17, 2003 the Court of Appeals dismissed the Republic's appeal for lack of jurisdiction, stating that it found "no basis upon which to assert jurisdiction over this appeal because the district court has yet to determine what amount, if any, of the restrained funds is owned to the Republic. As a result, the district court's order has had no legal effect, nor does it determine with finality any aspect of the motions of the parties." The Court of Appeals went on to state:

> The proper course is to permit the district court to receive the additional evidence it has indicated is necessary to make a final determination of the restrained funds owned by Pertamina. We trust that the district court knows, and will be mindful of the fact, that if and when some portion of the restrained

> funds is determined to be owned by the Ministry, no portion of the Ministry's funds can serve as security to satisfy the debt of Pertamina. Further, we note that nothing in our prior orders in this case prevented the district court from restraining incoming funds that belong to Pertamina, up to the amount of the judgment due to appellee Karaha Bodas Company, LLC ("KBC").

The Court also denied the mandamus petition.

The Current Issue for Decision

Although this opinion deals with four motions, there is one basic issue which now needs to be decided as a result of all of the motions. This relates to the period of time over which the Retention Fees passing into the adjudicated accounts should be considered to have been captured by the restraining notice served on Bank of America.

The Republic and Pertamina contend that the restraining notice was operative against the adjudicated accounts only until June 7, 2002, when the amount restrained in these accounts and in the other seven accounts at Bank of America reached approximately double the amount of the judgment plus interest, or a total of $546 million—$503 million in the adjudicated accounts and $43 million in the other seven accounts. As already described, the Court of Appeals issued an order on June 18, 2002 requiring that the portion of the $503 million to be restrained should be reduced to the amount of the judgment ($261.1 million). The parties agree that interest should be added. As of June 18 the amount of the judgment plus interest was $277 million and interest has continued to accrue. The Republic and Pertamina now take the position that 5/65 of the $277 million plus interest, or a

little over $20 million, is all that is available to KBC out of the adjudicated accounts, to secure its judgment or to be executed upon.

KBC's position is radically different. KBC contends that all Retention Fees coming into the adjudicated accounts from February 22, 2002 (when the restraining notice was served) until the present time have been, and will be, captured by the restraining notice, up to the amount of the $277 million plus interest.

Discussion

Fed. R. Civ. P. 69(a) provides as follows:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution ... and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought....

New York C.P.L.R. § 5222(b) is one of the New York provisions dealing with supplementary proceedings following a judgment, and provides for restraining notices.

> All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person [a party served with a restraining notice], including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice. Such a person is forbidden to

> make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs.... If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

A further provision allows a court on its own initiative or on the motion of any interested party to make an order conditioning or modifying the use of a procedure for enforcing a judgment. C.P.L.R. § 5240.

Pursuant to § 5222(b), the restraining notice served on Bank of America applied to all funds which Pertamina was "known or believed to have an interest then in or thereafter coming into the possession or custody of" Bank of America. The Bank was required to apply the restraint to such funds until the withheld money "belonged or owed to" Pertamina is "equal or twice the amount due on the judgment." After that "the restraining notice is not effective as to other property or money." C.P.L.R. § 5222(b).

As already described, Bank of America restrained funds beginning February 22, 2002, when the notice was served. It restrained funds payable to Pertamina in the fifteen adjudicated accounts, as well as the seven other accounts mentioned previously. All these restrained funds were deemed to

be funds in which Pertamina was "known or believed to have an interest," despite the fact that there was a contest over who actually owned the funds payable to Pertamina. Although Bank of America was not a party to that contest, it promptly learned about it. But Bank of America restrained all the funds in the twenty-two accounts payable to Pertamina. Under § 5222(b), the restraining notice would continue to operate until the "money belonging or owed to" Pertamina was equal to twice the amount due on the judgment.

On April 5, 2002 the District Court held that only the Retention Fee portion of the funds payable to Pertamina actually belonged to Pertamina. This would be 5/65 of those funds. Nevertheless, Bank of America continued restraining the funds after the April 5 decision.

Bank of America ceased restraining further funds as of June 7, 2002 when the amount withheld from all twenty-two accounts reached $546 million. This cessation occurred despite the fact that twice the amount of the "money belonging or owed to" Pertamina was only a fraction of the $546 million, according to the District Court ruling. Under this ruling, Pertamina was entitled to 5/65 of the $503 million in the adjudicated accounts or $39 million. There had been no determination as to the ownership of the $43 million in the other seven accounts. Thus, as of June 7, 2002, taking into account the District Court ruling, out of the $503 million restrained in the adjudicated accounts only $39 million was "money belonging or owed to" Pertamina. If this $39 million is added to the entire $43 million in the other seven accounts, the total of $82 million was far less than twice the amount due on the judgment. Thus there was, and is, no basis for any theory that the restraining notice ceased to operate against Bank of America on June 7, 2002.

Shortly thereafter the Court of Appeals issued its order of June 18, 2002, allowing appeals from the District Court's order of April 24, 2002. At the same time, the Court of Appeals directed that the amount of the restrained funds from the adjudicated accounts be reduced. The statement of the Court, already quoted, bears repetition.

> Because Bodas also has a substantial possibility of success on the merits, we conclude that the district court did not abuse its discretion. However, we modify the stay to apply only to sufficient funds to satisfy the judgment, because no legitimate interests are served by tying up funds beyond what would be necessary to make Bodas whole if it prevails on appeal.

Although the Court of Appeals did not expressly refer to a state statute, its modification of the restraint was consistent with C.P.L.R. § 5240.

The Court did not deal with the issue of Retention Fees, nor did it voice any opinion as to how § 5222(b) would be applied to Retention Fees. It surely did not sanction any idea that KBC's rights under § 5222(b) were cut off in such a way that the amount of KBC's security was a mere $20 million. Any such assumption would have been wholly contrary to the structure which the Court of Appeals was setting up. The Court simply stated that an *amount of money* sufficient to satisfy the judgment was all that should be withheld, and that there was no need to set aside twice that amount. But whether it was Retention Fees which made up that amount, and if so, over what period of time those Retention Fees accrued—these were questions which the Court of Appeals did not touch.

Based on their present accountings, Pertamina and the Republic have reported to the court that during the period from February 22 through December 31, 2002 a total of $178,161,403 in Retention Fees passed into the adjudicated accounts at Bank of America.[3] Since about $39 million in Retention Fees had gone into those accounts as of June 7, 2002, it appears that there was another $139 million by the end of the year.

What occurred in 2003 has unfortunately not been resolved. At a hearing of August 27, 2003, the attorney for Pertamina estimated that the Retention Fees relating to the adjudicated accounts were running about $10 million per month. An indication of a somewhat different amount appears from the fact that about $1.9 billion in funds payable to Pertamina passed into the adjudicated accounts in 2003, and using the 5/65 fraction would yield Retention Fees of about $146 million for 2003. However, Pertamina and the Republic have now come up with various arguments which would whittle down the 2003 figure to much lower amounts or possibly zero, depending on how their various contentions play out. Since the purpose of this opinion is largely to resolve an issue in principle, the details of the contentions of Pertamina and the Republic regarding 2003, and the counter-contentions of KBC, will not be set forth or resolved here.

Regarding the seven other accounts, as of November 2003 the amount restrained in these accounts was $289 million. There has not been any adjudication regarding what portion of the $289 million belongs to Pertamina. But it cannot be assumed that it is all of the $289 million,

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[3] Prior to the hearing of January 27, 2004 there was some dispute about the correctness of the $178,161,403. But at the hearing all parties agreed to this figure.

and if it were to turn out that Pertamina's share was 5/65, then the amount owned by Pertamina and subject to execution would be about $22 million.

It is now necessary to decide how C.P.L.R. § 5222(b) operated after June 7 and June 18 on the adjudicated accounts.

Pertamina and the Republic contend that the operation of the restraining notice ceased when the amount withheld in the adjudicated accounts, and the seven other accounts, reached $546 million on June 9, 2002—*i.e.*, twice the amount of the judgment plus interest. But Pertamina and the Republic are involved in a contradiction. For the purpose of stopping the operation of the restraint they argue that the amount subject to § 5222(b) reached double the amount of the judgment on June 7. But for the purpose of limiting the amount which actually secures KBC's judgment, Pertamina and the Republic argue that this is only a small fraction of the amount restrained—actually only 5/65 of the $277 million plus interest limit imposed pursuant to the Court of Appeals order of June 18, 2002, this fraction being as of that time, a little over $20 million.

This is not the proper application of the law. In setting forth what *is* proper, it is appropriate to accept one prong of the argument of Pertamina and the Republic. It is now established as of the adjudicated accounts that the only part of the funds payable to Pertamina which actually *belonged* to Pertamina, were the Retention Fees. So, according to Pertamina and the Republic's own argument, with which the court agrees, this should be the basis for deciding how § 5222(b) applied. What was formerly uncertain about property rights is now settled.

The court has stated earlier that there was no basis for any idea that the restraining notice ceased to operate against Bank of America on June 7, 2002 when the total funds withheld in

all the accounts reached $546 million ($503 million in the adjudicated accounts and $43 million in the other seven accounts). The reason is that as of this time the District Court had ruled that only the Retention Fee portion actually belonged to Pertamina and was subject to execution, and this was only a fraction of the $546 million. Obviously, there was still doubt about the ownership of the funds because the District Court ruling was subject to appeal, but there is no justification for any categorical position that KBC's rights of restraint against the adjudicated accounts ceased as of June 7, 2002. And we now know that the Court of Appeals affirmed the District Court.

As a matter of law under § 5222(b), the restraining notice would continue to operate after June 7, 2002 until the withheld "money belonging or owed to" Pertamina was equal to twice the amount of the judgment. The Court of Appeals order of June 18, 2002 did not halt the operation of § 5222(b). All that Court did was to modify the *limit*, so that, instead of a limit of twice the amount of the judgment, there was a ceiling of the amount of the judgment.

After June 18, funds payable to Pertamina were continuing to flow into the adjudicated accounts. A portion of these funds (the Retention Fees equal to 5/65 of those funds) *belonged* to Pertamina. Pursuant to § 5222(b), with the modification of the Court of Appeals, the *restraint* continued to apply to the Retention Fees coming into the adjudicated accounts and would continue to apply until the total of the Retention Fees reached the amount of the judgment plus interest. As of November 2003 this was about $290 million. Thus the restraint applied to the entire $178,161,403 in Retention Fees entering the adjudicated accounts from February 22 to the end of 2002 and also the Retention Fees earned thereafter up to an additional amount of at least $110 million.

As Retention Fees continued to flow into the adjudicated accounts after June 18, 2002, Bank of America was not required literally to put a freeze on these post-June 18 Retention Fees. The $277 million (or the $290 million) was many times larger than the amount of Retention Fees that had passed into the adjudicated accounts. As time moved on from June 18, and additional Retention Fees continued to flow into the accounts, the restraint applied to those fees, as already described, up to the amount of the limit established by the Court of Appeals. But the amount of money withheld pursuant to the Court of Appeals's order continued to be much larger than the Retention Fees subject to restraint. For instance, as of the end of 2002 the amount withheld was a little over $280 million, whereas the total Retention Fees subject to the restraint was $178 million. Thus, Bank of America did not need to, and indeed could not, literally put a hold on these Fees.

Thus we have a situation, perhaps unique, where Retention Fees were subject to restraint as they passed into the adjudicated accounts, but where Bank of America could not literally freeze the additional Fees because there was already a sum of money withheld which was far in excess of the Retention Fees as they were coming into Bank of America.

It is necessary at this point to examine the nature of the funds dealt with by the June 18, 2002 Court of Appeals order. Pertamina and the Republic in effect argue that such funds constituted a kind of *res*, owned partly by Pertamina (and thus subject to execution by KBC) and partly by the Republic, which *res* amounted to $277 million as of June 18, 2002. According to Pertamina and the Republic when it was later held by the Court of Appeals that Pertamina owned only the Retention Fee portion and the Republic owned the

rest, this established what KBC had a right to execute on, and that was limited to $21 million out of the $277 million *res*. Pertamina and the Republic contend that the Republic had a right to take the other $256 million. If distribution was held up by litigation, interest might accrue, but this would simply be an amount of additional money to be shared out of such *res*.

It will be recalled that Pertamina and the Republic take the view that the restraining notice against the adjudicated accounts ceased to operate on June 7, 2002, when the amount restrained in the accounts and the other seven accounts reached twice the amount of the judgment. It follows, in their view, that the restraining notice did not have any further operation after the June 18, 2002 Court of Appeals order. Thus, according to the contention of Pertamina and the Republic, after the division of the *res* of $277 million plus interest, there is nothing further available to KBC to secure its judgment beyond the $21 million portion of the $277 million plus a small amount of interest.

These positions of Pertamina and the Republic are not supported by either the facts or the law. No court has held that KBC's rights are limited to a $21 million share of the $277 million on the basis that the $277 million was a *res* belonging to two property owners or on any other basis. As to the June 18, 2002 ruling, all that the Court of Appeals did was to fix a limit on the *amount* of money which Bank of America could withhold. The Court did not decide anything about who would or would not have property rights or security rights in that amount of withheld money. The issue of property rights was to be determined on the appeal. The court said that the stay should "apply only to sufficient funds to satisfy the judgment." The *amount of money* should be sufficient to satisfy the judgment but no more.

The December 2002 decision of the Court of Appeals phrased the question on appeal as follows:

> The question on appeal concerns the ownership of the funds in the Bank of America trust accounts. . . .

Karaha Bodas v. Pertamina, 313 F.3d 70, 75 (2d Cir. 2002). In affirming the District Court ruling that Pertamina owned only the Retention Fee portion of these accounts, the Court of Appeals was dealing with the "trust accounts," not with a specified fund or *res* of $277 million or thereabouts. This is made clear in numerous parts of the opinion. *See, e.g., id.* at 78, 79, 83, 93. The Court, referring to its June 18, 2002 order, stated:

> Finally, we modified the stay to apply only to those funds that would be necessary and sufficient to satisfy a judgment.

Id. at 84. Thus the Court of Appeals did not indicate in any way that KBC's rights were limited to some fraction of a $277 million *res*.

After losing its argument that KBC was entitled to execute on *all* the funds nominally payable to Pertamina, KBC, in its February 2003 motion, raised as one of the issues the duration of the restraint, which is the subject of the present opinion. As described earlier, at a hearing on May 23, 2003 and in an order of May 30, the District Court, while not finally deciding the question, issued a direction having *prospective* effect, that "beginning now and from this time forward, the restrained funds [$277 million plus interest] will be considered security for all Retentions earned by Pertamina in connection with the projects involved in the accounts subject to the stay."

This was flatly contrary to the idea that KBC's rights were limited to certain property rights in a $277 million *res*.

While the Court of Appeals in December 2003 refused to take jurisdiction of an appeal and denied mandamus—all without an extensive opinion—it made a significant pronouncement, which was clearly consistent with the approach of the District Court in its May ruling. The Court stated:

> Further, we note that nothing in our prior orders in this case prevented the district court from restraining incoming funds that belong to Pertamina, up to the amount of the judgment due to appellee Karaha Bodas Company, LLC ("KBC").

Thus there are the most solid grounds for concluding that KBC's restraining notice is not limited in its application to a portion of a finite *res*, consisting of the $277 million plus interest. The $277 million is an amount of money held by Bank of America. It was a portion of the $503 million which was blocked at a time when the restraint was being applied to *all* funds payable to Pertamina and before the ownership of the account was decided. The $277 million fund exists because that amount of money is "sufficient ... to satisfy the judgment," in the words of the June 18, 2002 Court of Appeals order.

It is necessary now to return to the matter of restraint of Retention Fees in the adjudicated accounts. For reasons explained earlier in this opinion, we do not look to the $277 million to determine how much Retention Fees were subject to restraint. By virtue of the operation of the restraining notice and § 5222(b), all Retention Fees entering the adjudicated accounts from February 22, 2002 to the present have been subject to restraint, up to the amount of the judg-

ment plus interest (as of November 2003 $290 million). The amount of Retention Fees subject to the restraint was $178 million as of December 31, 2002 and may have increased by about $10 million per month thereafter. Under § 5222(b) Bank of America is responsible for placing a hold on and accumulating restrained funds. But Bank of America had in place a fund, which was $277 million as of June 18, 2002 and which has grown to adjust for interest. Provided that the Retention Fees are sufficient, the time will come (or has come) when the amount of Retention Fees subject to restraint is exactly the amount in the Bank of America fund.

Instead of literally withholding Retention Fees, at least after June 18, 2002, Bank of America had the $277 million fund in place, as a substitute for the withholding duty it would otherwise have had. Fees, as they entered the adjudicated accounts, should be deemed to be withheld in the Bank of America fund. For instance, if $1 million in Retention Fees entered the adjudicated accounts on July 1, 2002, Bank of America did not literally need to withhold those funds, but $1 million of the funds *already* held should be considered as becoming Retention Fees withheld by Bank of America. Thus, as of December 31, 2002 the $178 million Retention Fees subject to restraint should be considered $178 million in Retention Fees withheld by Bank of America as part of the $277 million (plus interest) fund. The same would apply to further Retention Fees up to the limit established by the Court of Appeals. The amount of these further Retention Fees is yet to be determined.

For these reasons, the court holds that KBC is entitled to restrain, and execute on, the amount of all Retention Fees passing into the adjudicated accounts beginning February 22, 2002 up to the amount of the judgment plus interest.

Further Proceedings

The December 17, 2003 order of the Court of Appeals noted that the District Court should "act without delay" and should move "forward expeditiously" to determine the amount of restrained funds owned by Pertamina versus the amount owned by the Republic.

The record shows the various proceedings in the District Court designed to resolve the above issue, going back well before the December 17 order. The District Court will continue in that direction, fully mindful of the admonition of the Court of Appeals. Unfortunately, the matter is unusually complex, and issues of fact and law keep surfacing which require further proceedings to resolve.

Conclusion

KBC's February 2003 motion is denied as moot, because the issues raised have been presented in one or mo. of the other motions. Pertamina's February 2003 motion to stay execution is denied. The Republic's April 2003 motion seeking release of $262 million is denied. KBC's June 2003 motion is largely granted by virtue of the decision in this opinion.

Because of the uncertainty surrounding the calculation of Retention Fees after January 1, 2003, the court is deferring any ruling about actual turnover of funds. Although the court has concluded that KBC will be entitled to execute on at least the $178 million Retention Fees for 2002, more than $100 million is in dispute pending the resolution of questions regarding 2003 Retention Fee earning by Pertamina. Because there appears to be a substantial probability that Retention Fee earnings since January 1, 2003 will, together with the $178 million, be equal to all, or nearly

all, of the amount of the judgment plus interest, the court cannot at this time release any restrained funds to the Republic.

Dated: New York, New York
January 29, 2004

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WI .L NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 17th day of December, two thousand and three.

Docket No. 03-7705
Filed December 17, 2003

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. PIERRE N. LEVAL,
HON. SONIA SOTOMAYOR,
Circuit Judges.

KARAHA BODAS COMPANY, LLC,

Petitioner-Appellee,

v.

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Respondent-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"),

Respondent.

For Appellant:	CAROLYN B. LAMM, White & Case LLP (Frank Panopoulos and R. Shawn Gunnarson, *on the brief*), Washington, D.C.
For Appellee:	CHRISTOPHER F. DUGAN, Paul, Hastings, Janofsky & Walker LLP (Bruce D. Ryan, James E. Berger, Quisaira Almanzar Whitney, and Lamia R. Maria, *on the brief*), Washington, D.C.
For Respondent:	MATTHEW D. SLATER, Cleary, Gottlieb, Steen & Hamilton (Jonathan I. Blackman and Justin S. Anand, *on the brief*), Washington, D.C.

SUMMARY ORDER

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York (Griesa, J.) it is hereby

ORDERED, ADJUDGED AND DECREED that the appeal of the judgment of the district court is DISMISSED for lack of jurisdiction and that the petition for a writ of mandamus is DENIED.

Respondent appellant the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeals from a May 30, 2003 memorandum and order of the United States District Court for the Southern District of New York (Griesa, J.) relating to a hearing held on various motions of the parties.

The Ministry claims that the district court's order wrongfully attached as security for a debt of another party funds belonging to the Ministry, in contravention of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). According to the Ministry, the order provides that from May 30, 2003 forward, certain restrained funds that include funds belonging to the Ministry will serve as security for a judgment debt of respondent non-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"). Thus the Ministry contends that its property is denied the immunity from attachment and execution to which it is entitled under the FSIA. Further, the Ministry argues on appeal that such alleged treatment disregards the mandate of this Court in *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70 (2d Cir. 2002), *cert. denied*, 123 S.Ct. 2256 (2003).

Notwithstanding the conventional principle that an order granting security is not appealable, *see Caribbean Trading & Fidelity Corp. v. Nigerian National Petroleum Corp.*, 948 F.2d 111, 114 (2d Cir. 1991), an order granting security might be appealable where the order presents an important issue of law, *see Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 398 n.1 (2d Cir. 1995); *Banque Nordeurope S.A. v. Banker*, 970 F.2d 1129, 1130-31 (2d Cir. 1992), or imposes an exceptional burden, *see Caribbean Trading & Fidelity Corp.*, 948 F.2d at 114 (justifying nonappealability of orders granting attachment on premise that attachment orders are not generally overly burdensome); *Drys Shipping Corp. v. Freights, Sub-Freights, Charter Hire*, 558 F.2d 1050, 1052 (2d Cir. 1977) (same). Either of these situations could potentially be presented by an order that impinges on a legally protected immunity, such as the immunity of a foreign sovereign. *See Caribbean Trading & Fidelity Corp.*, 948 F.2d at 116 (noting importance of congressional policy underlying FSIA immunity from pretrial attachment and concluding that orders granting attachment of property of foreign sovereign are immediately appealable) (Mahoney, J., concurring); *cf. Stephens v. National Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-30, 1234 (2d Cir. 1996) (holding that the FSIA prevents restraints that are the functional equivalent of attachments); *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (dissolving injunction that prohibited negotiation of letters of credit by a foreign sovereign).

Here, however, we find no basis upon which to assert jurisdiction over this appeal because the district court has yet to determine what amount, if any, of the restrained funds is owned by the Ministry. As a result, the district court's

order has had no legal effect, nor does it determine with finality any aspect of the motions of the parties such as the amounts of the restrained funds owned by Pertamina. Rather, factual disputes remain outstanding and the district court has indicated that it will hold further hearings and receive additional briefings to make a final determination of the Retention. We therefore find that the district court's order is not appealable as a final order, as an injunction subject to interlocutory appeal under 28 U.S.C. § 1292(a)(1), or as a collateral order under *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). Lacking jurisdiction over the appeal, we dismiss.

The proper course is to permit the district court to receive the additional evidence it has indicated is necessary to make a final determination of the restrained funds owned by Pertamina. We trust that the district court knows, and will be mindful of the fact, that if and when some portion of the restrained funds is determined to be owned by the Ministry, no portion of the Ministry's funds can serve as security to satisfy the debt of Pertamina. Further, we note that nothing in our prior orders in this case prevented the district court from restraining incoming funds that belong to Pertamina, up to the amount of the judgment due to appellee Karaha Bodas Company, LLC ("KBC"). Our prior orders only prohibit the district court from restraining or allowing execution against any money determined to belong to the Ministry. *See Karaha Bodas*, 313 F.3d at 93 (directing the district court "to continue the stay presently in force or to substitute one similar until such time as the parties' rights to be disputed funds are finally determined"); Order, No. 02-8014, 02-8015, 02-8016 (2d Cir. June 18, 2002). We have no doubt that the district court will act without delay to deter-

mine the amount of the restrained funds owned by Pertamina.[1]

For the foregoing reasons, the appeal of the judgment of the district court is DISMISSED and the petition for a writ of mandamus is DENIED.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: /s/ LUCILLE CARR
Lucille Carr

[1] The Rule 28(j) submission made by KBC, indicating that Pertamina intends to request its business partners to use unrestrained accounts for future transactions so as to prevent further funds from being restrained, raises issues appropriately addressed by the district court as it moves forward expeditiously in resolving the amount of restrained funds owned by Pertamina.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC-98 (TPG)

In the Matter of An Arbitration Between

Karaha Bodas Company, L.L.C.,

Petitioner,

—against—

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"), and
Ministry of Finance of the Republic of Indonesia,

Respondents.

MEMORANDUM AND ORDER

On February 22, 2002, this Court issued Writs of Execution and Orders to Show Cause pursuant to which the Court, *inter alia*, permitted petitioner to issue restraining notices pursuant to Rule 69 of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules against accounts at several banks located in this district, including Bank of America N.A. The Restraining Notices were served on the banks, including Bank of America, on February 22, 2002.

On April 26, 2002 this Court entered an order resolving questions about the ownership of funds contained in several Bank of America accounts. In view of the imminent appeal, the Court imposed a stay of its decision, meaning

that funds would not be released from the accounts. The Restraining Notices would continue in effect.

All parties appealed from the April 26, 2002 order. Prior to the hearing of the appeal, the Ministry of Finance moved in the Court of Appeals to vacate the stay imposed by the District Court. In an order dated June 18, 2002 the Court of Appeals denied the motion of the Ministry of Finance, with the modification that the stay would apply only to sufficient funds to satisfy the judgment that was involved in these proceedings.

This Court will assume that the June 18, 2002 order of the Court of Appeals was complied with and continues to be complied with. No notice to the contrary has been given to this Court. This would mean that funds are restrained up to an amount necessary to satisfy the judgment.

Certain motions have recently been made to this Court relating to the "Retention," which has been declared by both the District Court and the Court of Appeals to belong to Pertamina and not to the Republic of Indonesia, resulting in the right of petitioner to execute on such Retention. However, petitioner has not been allowed to actually receive payment of funds constituting Retention. This is the result of the Restraining Notices and the stay, referred to earlier.

In the course of a hearing held on May 23, 2003, a question was raised as to the extent to which the restrained funds actually apply as security for petitioner's right to receive the Retention. This issue has not been the subject of any specific motion nor has it been decided. The Court will not attempt in this Memorandum and Order to summarize the lengthy and technical discussion which occurred at that hearing. The Court will simply refer to pages 60-92 of the transcript.

Petitioner will now make a motion addressed to this issue. The issue will relate in large part, it appears, to Retentions which have been earned by Pertamina in the past and up to the present time. But there is also an issue about Retentions which are earned by Pertamina beginning now and going into the future. For the reasons stated on May 23, the Court has decided to enter an immediate order dealing with future Retentions.

Accordingly, the Court directs that, beginning now and from this time forward, the restrained funds will be considered security for all Retentions earned by Pertamina in connection with the projects involved in the accounts subject to the stay. The amounts of such Retentions will be subject to findings by the Court on presentation of appropriate evidence. This order is without prejudice to the rights of the parties to assert their positions on the upcoming motion.

SO ORDERED.

Dated: New York, New York
May 30, 2003

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

[70] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued: Aug. 7, 2002.
Decided: Dec. 10, 2002.

Docket Nos. 02-7513(L), 02-7515(CON), 02-7547(XAP), 02-7715(CON), 02-7717(CON), 02-7723(XAP).

KARAHA BODAS COMPANY, L.L.C.,

Petitioner-Appellee-Cross-Appellant,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA ("PERTAMINA"),

Respondent-Appellant-Cross-Appellee,

Ministry of Finance of the Republic of Indonesia,

Non-Party-Appellant-Cross-Appellee.

Judgment creditor of oil and gas company owned and controlled by Republic of Indonesia sought to execute upon funds that were held in New York trust accounts and derived from sales of liquefied natural gas (LNG) extracted in Indonesia. The United States District Court for the Southern District of New York, Thomas P. Griesa, J., ruled that, pursuant to Indonesian law, Republic of

Indonesia owned funds except for five percent retention allocated to company. Parties and Ministry of Fi-**[71]**nance of the Republic of Indonesia cross-appealed. The Court of Appeals, Sack, Circuit Judge, held that: (1) Court of Appeals would accept jurisdiction over appeal; (2) company waived its sovereign immunity from attachment in United States courts; (3) New York's choice of law rules governed question of ownership of funds; (4) no actual conflict existed between the laws of New York and laws of Indonesia with respect to ownership of funds; (5) judgment creditor failed to establish that it reasonably relied upon company's ownership of funds, such that it was entitled to attach funds without regard to their legal ownership; and (6) with the exception of retention, Republic of Indonesia, rather than company, owned funds.

Affirmed with directions.

See also: 190 F.Supp.2d 936.

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[74] Christopher F. Dugan, Jones, Day, Reavis & Pogue (Gregory A. Castanias and Steven C. Bennett, of counsel), Washington, DC, *for Petitioner-Appellee-Cross-Appellant.*

Matthew D. Slater, Cleary, Gottlieb, Steen & Hamilton (Jonathan I. Blackman, J.J. Gass, and Justin Anand, of counsel), Washington, DC, *for Respondent-Appellant-Cross-Appellee.*

Carolyn B. Lamm, White & Case (Francis A. Vasquez, Jr., and Frank Panopoluos, of counsel), Washington, DC, *for Non-Party-Appellant-Cross-Appellee.*

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[75] Before: CALABRESI, POOLER, and SACK,

Circuit Judges.

SACK, *Circuit Judge.*

Respondent-appellant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") and non-party-appellant the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeal from an April 26, 2002, memorandum and order issued by the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*) insofar as it permits petitioner-appellee Karaha Bodas Company, L.L.C. ("KBC") to execute against a portion of the funds in several Bank of America trust accounts that are listed in the district court's order. KBC appeals the same order insofar as it denies KBC's motion to execute against the remainder of the same funds. The question on appeal concerns the ownership of the funds in the Bank of America trust accounts, which derive from sales of Indonesian liquefied natural gas ("LNG"), and whether such funds can be attached under New York law, as applicable pursuant to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). KBC's claim rests on the allegation that all such funds belong to Pertamina, and on the alternative theory that KBC was entitled to rely on Pertamina's ownership thereof. Pertamina and the Ministry respond that under Indonesian law, the funds belong to the Republic of Indonesia.

We agree with the district court's disposition of the ownership question. The district court correctly analyzed the Indonesian law that controls the ownership of the funds and correctly concluded that most, but not all, of the funds belong to Indonesia. Accordingly, we affirm.

BACKGROUND

The Parties

KBC describes itself as "a Cayman Islands limited liability company formed by two American power companies and other investors, and is 90%-owned by U.S. investors." Petitioner-Appellee's Br. at 2. The Ministry, acting on behalf of the Government of the Republic of Indonesia, is a "foreign state" within the meaning of the FSIA, 28 U.S.C. § 1603(a).[1] Pertamina is an oil and gas company owned and controlled by the Republic of Indonesia. Pertamina engages in oil and gas exploration, extraction, processing, marketing, transportation, and distribution. The 1971 statute creating Pertamina, Law 8 of 1971, explains that the company's goals are "to develop and carry out the exploitation of oil and natural gas ... for the maximum prosperity of the People and the State."[2] Law of the Republic of Indonesia Number 8 Year 1971, Art. 5. The Indonesian government owns all of Pertamina's equity and controls a supervisory board, constituted pursuant to Law 8, that supervises Pertamina's management.[3] Pertamina,

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[1] 28 U.S.C. § 1603(a) defines "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* None of the parties dispute that the Ministry is a foreign state for the purposes of the FSIA.

[2] Pursuant to Government Regulation Number 27 of 1968, Pertamina was initially established as the National Oil and Gas Mining State Enterprise, but was reorganized under Law 8. Prior to Law 8's issuance, the Republic of Indonesia had authorized different state enterprises to extract and sell natural gas and oil pursuant to Articles 5 and 6 of Law 44 of 1960.

[3] Pertamina is currently in a state of legal flux because of changes in its organic statute. Under Law 22 of 2001, Pertamina must, within two years, change "from a state enterprise to a state-owned limited

for [76] purposes of the FSIA, is therefore "an agency or instrumentality of a foreign state."[4] 28 U.S.C. § 1603.

The KBC-Pertamina Geothermal Energy Contracts

In November 1994, KBC executed two contracts—a "Joint Operation Contract" and an "Energy Sales Contract"—with Pertamina and another Indonesian state-owned entity, Persero, for the development of geothermal energy extraction facilities in the Karaha area of West Java. In these contracts, Pertamina waived "any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may acquire in the future." *See, e.g.*, Karaha Geothermal Joint Operation Contract, Art. 21.7(c); Karaha Geothermal Energy Sales Contract, § 15.8(c). Pertamina also "consent[ed] in respect of the enforcement of any judgment against it." Karaha Geothermal Joint Operation Contract, Art. 21.7(d); Karaha Geothermal Energy Sales Contract, § 15.8(d). The contracts did not contain any representa-

liability company." Decl. of Sudargo Gautama ¶37. Law 22 repeals Law 8 and Law 44, but leaves in place implementing regulations that supplement those laws. Draft Law of the Republic of Indonesia Number 22 of 2001, Art. 66. But "Law 22/2001 has not yet been implemented with respect to Pertamina." Supp. Decl. of Sudargo Gautama ¶6. The parties' experts on Indonesian law apparently agree that this case should be decided according to the pre-Law 22 regulations. *See* Decl. of Sudargo Gautama ¶ 36; Decl. of Robert N. Hornick ¶ 14.

[4] 28 U.S.C. § 1603 includes any entity in which a government has "a majority of . . . shares or other ownership interest." 28 U.S.C. § 1603(b). "A typical governmental instrumentality . . . is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Pertamina satisfies this description.

tions about KBC's right to attach particular assets in case of default or breach. And KBC points to no evidence, either within the contracts' text or in pre-contract negotiations, that Pertamina made any representations regarding its ownership of LNG revenues or its obligation to provide a security interest. Each contract also contained a choice of law clause specifying Indonesian law and provided that disputes would be resolved by an international arbitral tribunal constituted under the Arbitral Rules of the United Nations Commission on International Trade Law.

In 1997 and 1998, Indonesia experienced a fiscal crisis that induced political instability and the eventual collapse, on May 21, 1998, of the regime led by President Mohamed Suharto. In the course of the crisis, on September 20, 1997, the KBC projects were suspended by an Indonesian "Presidential Decree," along with approximately seventy-four other government-related infrastructure projects. In November 1997, another decree permitted the KBC projects to proceed again, but in January 1998, a third decree terminated the KBC projects once more, despite lobbying by KBC and Pertamina, among others.

Arbitration on the Geothermal Energy Contracts

On April 30, 1998, KBC commenced arbitration in Geneva, Switzerland, alleging that the project's termination constituted a breach of the geothermal energy contracts. On September 30, 1999, the Swiss arbitral panel issued a preliminary ruling rejecting Pertamina's objections to arbitration and concluding that all of KBC's claims could be addressed in a unitary proceeding. The arbitral panel also rejected KBC's motion to treat the Republic of Indonesia [77] as a party to the geothermal energy contracts.

In a December 18, 2000, award, the arbitral panel concluded that KBC had been "prevented from pursuing the performance of the binding contracts that it relie[d] upon for reasons beyond its control . . . [and] should not bear the consequences thereof." Final Award in an Arbitration Procedure Between KBC and Pertamina and Persero, at 31. The arbitral panel awarded KBC damages for lost investments of $111.1 million and lost profits of $150 million plus interest and fees. *Id.* at 35-47. On February 1, 2001, Pertamina filed an appeal in the Supreme Court of Switzerland. The appeal was dismissed on April 24, 2002. Pertamina also asked an Indonesian court to enjoin enforcement and annul the award.[5]

Proceedings in the Southern District of Texas

KBC sought enforcement of the award in the United States District Court for the Southern District of Texas pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, implemented by Chapter Two of the Federal Arbitration Act, 9 U.S.C. §§ 201-208. Rejecting Pertamina's numerous asserted defenses, the district court (Nancy Atlas, *Judge*) entered final judgment on December 4, 2001, in the amount of $261.1 million and interest at the rate of four percent per annum for KBC.[6] *Karaha Bodas Co. v. Perusa-*

[5] Pertamina filed suit on March 14, 2002, in Indonesia, requesting both annulment of the arbitral award and an injunction preventing KBC from enforcing the arbitral award. A court in Jakarta, Indonesia enjoined KBC from taking action to enforce the judgment anywhere in the world, threatening a $500,000 per diem fine for violations.

[6] In response to the Indonesian order annulling the arbitral award, *see supra* note 5, Judge Atlas issued her own injunction barring Pertamina from requesting enforcement of the Indonesian order. Tr. of

haan Pertambangan Minyak Dan Gas Bumi Negara, 190 F.Supp.2d 936, 957 (S.D.Tex.2001). Pertamina's appeal of that order is pending before the Fifth Circuit.

KBC, in an attempt to enforce the judgment, then moved before the Southern District of Texas to register that judgment in other judicial districts within the United States pursuant to 28 U.S.C. § 1963.[7] KBC filed with the court, among other papers, an affidavit alleging that Pertamina had assets in seven New York banks. Judge Atlas held that KBC had fulfilled the requirement of 28 U.S.C. § 1610(c) that a party seeking to attach a foreign sovereign's property refrain for "a reasonable period of time" after judgment, and permitted KBC to register the judgment in Delaware, New York, and California federal district courts. On February 15, 2002, Judge Atlas also granted KBC's motion for an *ex parte* writ of garnishment against Bank of America.

Proceedings in the Southern District of New York

On February 22, 2002, KBC presented the December 4, 2001, Southern District of Texas judgment to the United States District Court for the Southern District of New York for registration. The same day, the latter court issued an *ex parte* writ of execution and order to show cause pursuant to Fed R. Civ. P. 69(a) and 28 U.S.C. § 1610(c) "author[izing KBC] to execute upon any property of Pertamina within this jurisdiction in satisfaction of the out-**[78]**standing final judgment, amounting, to date, in total to

March 29, 2002 Hearing Before Judge Atlas, at 5-6. Judge Atlas's injunction has been appealed to the Fifth Circuit.

[7] 28 U.S.C. § 1963 permits registration of a judgment "when ordered by the court that entered the judgment for good cause shown." *Id.*

the sum of $261,166,654.92 plus interest from January 1, 2001." Pursuant to Fed.R.Civ.P. 69(a) and N.Y. C.P.L.R. § 5222(b),[8] the district court issued restraining notices, which KBC subsequently served upon Bank of America and several other banks.

The Nature of the Disputed Funds

This appeal concerns fifteen trust accounts at Bank of America.[9] These accounts contain funds from the sale of LNG extracted in Indonesia under arrangements called Production Sharing Contracts ("PSCs"), which are governed by Indonesian law.

As mandated by Indonesian law, Pertamina enters into PSCs with private oil and gas contractors for the extraction of Indonesian crude oil and natural gas.[10] The Republic of Indonesia is not party to the PSCs, but it must approve them. Under a PSC, the private contractor (the "PSC contractor") is responsible for all exploration, development, extraction, production, transportation, and marketing oper-

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[8] Rule 69(a) provides, "Process to enforce a judgment for the payment of money shall be a writ of execution. . . . The procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held. . . ." Fed.R.Civ.P. 69(a).

[9] The district court's analysis (and hence this appeal) does not concern trusts "containing non-PSC Operating Income: the Musi II, Exor I, Cilacap and the throughput fee portion of the East Java Pipeline trusts." Final Order ¶ 17. The district court concluded that the record was "insufficient to determine whether KBC is entitled to execution against these accounts." *Id.* ¶ 18.

[10] Geothermal energy contracts and PSCs are different. Pertamina entered into geothermal energy contracts with KBC for the purposes of developing extraction facilities. Pertamina entered into PSCs with private oil and gas contractors for the purposes of extracting oil and natural gas.

ations related to a specified geographic area under Pertamina's management. As part of their compensation, PSC contractors initially receive a share of the oil or natural gas after extraction. They then transfer the remaining oil or gas to Pertamina.

PSC contractors must deliver the extracted natural gas to Pertamina, which then transports the gas for domestic sale or for conversion into LNG at liquefaction plants. Pertamina sells LNG to foreign buyers pursuant to long-term sales contracts that contain choice of law clauses specifying New York law as governing the contracts. LNG sales were the "largest single source of Pertamina sales revenue" in the last nine months of 2000. Decl. of Robert N. Hornick ¶ 22. Buyers of LNG remit payment to specified trust accounts in New York. In all such LNG sales, Pertamina, in its own name, purports to transfer title to the LNG, or title to the refined product, to the buyer. Pertamina warrants that it has "good title to the [LNG], free of all liens and encumbrances of any kind." *Id.* ¶ 23(b). Revenues from sales of natural gas are also sent to trusts in New York. The trusts "distribute the proceeds in accordance with trust agreements and ultimately to the [PSC contractor] in accordance with their respective [PSCs]." Decl. of Sahala L. Gaol ¶ 9. However natural gas is sold, and whether or not it is liquefied, proceeds from sales are first paid into trust accounts such as those at Bank of America.

Bank of America is the trustee of the accounts deposited with it. Before making any allocations or distributions, it credits all LNG revenues from a particular project, or subpart of a project, to a general account. The general accounts and other subaccounts are operated pursuant to con-[79]tractual arrangements known as Trustee and Pay-

ing Agent Agreements ("TPAA") that define the trustee's obligations. TPAAs are signed by Bank of America, Pertamina, and relevant PSC contractors, but only Pertamina has authority to direct payment. *See, e.g.*, Bontang V Trustee and Paying Agent Agreement of July 1, 1995, Art. 3.5(b)(i). Like the LNG sales contracts, the TPAAs also contain choice of law clauses specifying New York law as governing. *Id.* Art. 13.6.

Before any distribution can be made to Pertamina or the PSC Contractor, the TPAAs specify that production expenses—which include debt service payments, production costs, and trustee expenses—must be paid first. *Id.* Art. 3.3-3.4. After production payments are made, the "PSC Revenue" or the "Net Operating Income" remains in the general trust account. This remainder is essentially the net profit from the PSC, after costs have been deducted and debts have been serviced.

The PSC Revenue is then divided between Pertamina and the PSC Contractor for a particular project in contractually specified portions known as "Production Sharing Percentages." These payments are made to separate subaccounts or separate line accounts within the general trust account. *Id.* at 8. The funds at issue in this appeal are, thus, Pertamina's Production Sharing Percentage or, in the terms used in the contracts, Pertamina's share of the Net Operating Income.

Pertamina's Production Sharing Percentage is transferred directly to the Republic of Indonesia. Indeed, "Pertamina, at the direction of the Indonesian Government, has issued standing instructions to the Trustee to pay its Production Sharing Percentage to an account of the Government of Indonesia at Bank Indonesia." Decl. of Ainun Na'im ¶ 23. Evidence submitted by the Ministry and Pertamina sug-

gests that twenty percent of the Indonesian national budget derives from oil and natural gas revenues. *See* Decl. of Sahala L. Gaol ¶ 11. The funds are typically used to maintain Indonesia's foreign exchange reserves, and thus to service Indonesia's foreign debt. *Id.* ¶ 12.

The LNG Security Arrangement

One noteworthy feature of the trust arrangements is the mechanism whereby Pertamina borrows funds for the construction of natural gas liquefaction facilities, without requiring a counter-party lender to depend on Pertamina's willingness or ability to assure repayment. For example, the record contains 1997 loan agreements for funds to create a natural gas liquefaction facility. One loan agreement explains that "certain proceeds of liquefied natural gas" that are held in trust accounts at Bank of America are the "*sole* source of repayment." Bontang VI Loan Agreement of March 4, 1997, at 2 (emphasis added). A fixed percentage of gross revenues from LNG revenues in the trust accounts is therefore allocated to loan repayment, and only after loan repayments are complete can other disbursements be ma . Through this device, the LNG revenue stream structure protects lenders' interests.

The District Court's Opinion and Order

On March 23, 2002, Pertamina filed papers opposing KBC's order to show cause for a writ of execution on the ground that none of the restrained accounts contained property owned by Pertamina. The previous day, the Ministry, purporting to be a "Non-Party with Interest," had also filed a memorandum of law arguing that the restraining notices and writs of execution should be quashed.

Following supplementary briefing, the district court held a non-evidentiary hearing on April 5, 2002, and delivered an oral **[80]** decision on the ownership and disposition of the restrained funds in the trust accounts. According to the district court, "the ultimate ownership of the money . . . does not have to appear in the trustee and paying agent agreement," so the TPAAs' designation of Pertamina as trust owner was not dispositive. Tr. of April 5, 2002 Hearing, at 10-11. Nor could Pertamina's practice of paying the funds directly to the Republic of Indonesia dispose of the question. *Id.* at 51. The district court reasoned instead that the ownership of the LNG revenues in Pertamina's subaccount was a matter of Indonesian law, which explicitly allocated ownership rights in the funds. *Id.* at 80-81. Canvassing Indonesian law, the court concluded that Article 5(2) of Government Regulation 41 of 1982 vested ownership of all funds, except for a portion called the "Retention," in the Republic of Indonesia. "What is decisive on the question of property rights is a provision of Indonesian law which became effective in 1982 and article 5 of that law." *Id.* at 81. It allocated Pertamina's Production Sharing Percentage, less five percent of the Net Operating Income (which is designated Pertamina's "Retention"), to the Republic of Indonesia. This 1982 law, noted the district court, distinguished the Republic of Indonesia's interest from Pertamina's tax and dividend obligations. *Id.* at 83. Therefore, the only portion of the funds that KBC could attach was the five-percent portion—i.e., the Retention—which belonged to Pertamina. The district court memorialized its decision in a written order on April 26, 2002.

This Appeal

Pertamina and the Ministry appeal the district court's order and challenge its conclusion that the Retention is owned by Pertamina. The Ministry also contends that once the district court had concluded that the remaining funds belonged to the Republic of Indonesia, sovereign immunity foreclosed any further restraint of those funds. KBC appeals the portion of the order that is based on the district court's conclusion that KBC could not execute against the entirety of Pertamina's Production Sharing Percentage.

On June 18, 2002, we denied KBC's motion to dismiss the appeal, and permitted both the Ministry and Pertamina to appeal pursuant to either 28 U.S.C. § 1292(b), the collateral order doctrine, or both. We observed that the collateral order doctrine might apply because this appeal raised an issue of sovereign immunity, but expressly reserved judgment on the jurisdictional issues. Finally, we modified the stay to apply only to those funds that would be necessary and sufficient to satisfy a judgment.

DISCUSSION

I. Standard of Review

In a proceeding under the FSIA, "[t]he standard of review established for district court decisions regarding subject matter jurisdiction is clear error for factual findings and *de novo* for legal conclusions." *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 930 (2d Cir.1998). *De novo* review is appropriate even where the district court supplements the complaint with "undisputed facts from the record," as the court did here. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001) (citation and quotation marks omitted).

"Likewise, pursuant to Fed.R.Civ.P. 44.1, a court's determination of foreign law is treated as a question of law, which is subject to *de novo* review." *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir.1998). Finally, the district court's choice of law determination is also subject to *de novo* review. *Id.*

[81] II. Subject Matter Jurisdiction

Prior to consideration of the appeal's substance, we address two threshold subject matter jurisdiction questions: whether our statutory subject matter jurisdiction properly obtains and whether the Ministry is a proper party on appeal.

A. Statutory Appellate Jurisdiction

Ordinarily, appeals are permitted only from "final decisions of the district courts." 28 U.S.C. § 1291. One exception to this rule, contained in 28 U.S.C. § 1292(b), however, permits appellate jurisdiction over interlocutory civil orders "[w]hen a district judge ... [is] of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," and so certifies in a written order. 28 U.S.C. § 1292(b). Upon entry of such an order, the court of appeals has the discretion to accept or decline jurisdiction. *Id.*

On April 24, 2002, the district court certified this case for appeal under 28 U.S.C. § 1292(b). Final Order of April 24, 2002, at 6. The prerequisites for appellate jurisdiction are satisfied. First, the interaction of federal, New York, and Indonesian law poses "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Second, our review of the district court's order will advance the litigation by

resolving the disposition of funds that allegedly belong to a foreign sovereign. Pursuant to our discretion under 28 U.S.C. § 1292(b), we therefore accept jurisdiction to hear this appeal.[11]

B. The Ministry as Appellant

KBC did not name the Ministry as a party in its action to enforce the Swiss arbitral award in the Southern District of Texas. *KBC,* 190 F.Supp.2d at 939. Judge Atlas's final order names only Pertamina as a respondent. And the order certified in the Southern District of New York on February 22, 2002, again mentions Pertamina alone. Not until March 22, 2002, after the funds in the Bank of America trust accounts were attached, did the Ministry appear in the district court, then characterizing itself as a "Non-Party with Interest."

At first blush, the Ministry's absence from the initial proceedings and its failure to intervene pursuant to Fed.R.Civ.P. 24 seem to preclude its participation in this appeal. "[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz,* 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) (per curiam). But, as the Supreme Court recently made clear, the Ministry is indeed a "party" to the district court's judgment for present purposes, and can therefore properly appeal.

In *Devlin v. Scardelletti,* 536 U.S. 1, 122 S.Ct. 2005, 2008, 2013, 153 L.Ed.2d 27 (2002), the Court held that an unnamed member of a class could appeal a class action settlement at

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[11] Having accepted jurisdiction under 28 U.S.C. § 1292(b), we need not determine whether the collateral order doctrine provides an alternative vehicle to hear this appeal. *See Excimer Assocs. v. LCA Vision, Inc.*, 292 F.3d 134, 138 (2d Cir.2002) (describing the collateral order doctrine).

a fairness hearing even though he had failed to intervene earlier. The Court cautioned that "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id.* at 2010. To determine who may ap-**[82]**peal, courts must ascertain whether putative appellants are "bound by the order from which they were seeking to appeal." *Id.* In *Devlin,* for instance, the appellant faced a "final decision of [a] right or claim sufficient to trigger his right to appeal." *Id.* (citation and internal punctuation omitted).

Similarly, we have long allowed appeal "when the nonparty has an interest that is affected by the trial court's judgment." *United States v. Int'l Bhd. of Teamsters,* 931 F.2d 177, 183-84 (2d Cir.1991) (quoting *Hispanic Soc'y v. N.Y. City Police Dep't,* 806 F.2d 1147, 1152 (2d Cir.1986), *aff'd, Marino v. Ortiz,* 484 U.S. 301, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988)); *accord West v. Radio-Keith-Orpheum Corp.,* 70 F.2d 621, 624 (2d Cir.1934). "The question therefore is whether the putative appellant can identify an 'affected interest.' " *Kaplan v. Rand,* 192 F.3d 60, 67 (2d Cir.1999). The Ministry alleges that the Republic of Indonesia owns the property encompassed by the garnishment order. Under *Devlin, Kaplan,* and similar cases, this constitutes an "affected interest," which entitles the Ministry to join this appeal.

III. Execution Against or Attachment of Foreign Sovereigns' Property

Attachment of a foreign state's property in the United States is governed by the FSIA. In relevant part, the FSIA provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execu-

tion except as provided in sections 1610 and 1611 of [the FSIA]." 28 U.S.C. § 1609. Section 1610 provides different regimes for sovereign states on the one hand, and their agencies and instrumentalities on the other. First, 28 U.S.C. § 1610(a) provides that any property of a foreign sovereign that is

> used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States ... if ... (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver.

Id. Second, § 1610(b), which concerns foreign states' instrumentalities, such as Pertamina, provides in relevant part that:

> any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States ... if ... (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver.

Id. Subsection (a) is generally thought to be narrower than subsection (b). *Connecticut Bank of Commerce v. Republic*

of Congo, 309 F.3d 240, 252-65 (5th Cir.2002). While subsection (b) applies to *all* property of the agencies and instrumentalities of foreign states, subsection (a) applies only to the property of foreign states that is "used in commercial activity." *Id.*

In the appeal before us, sample geothermal energy contracts between Pertamina and KBC state that Pertamina "waive[s] any . . . right of immunity (sovereign or otherwise) which it or its assets now has or may have in the future." Karaha Geothermal Joint Operation Contract, [83] Art. 21.7(c); Karaha Geothermal Energy Sales Contract, Art. 15.8(c). Pertamina, through its use of the trust funds to channel LNG revenues, engages in commerce in New York. Under 28 U.S.C. § 1610(b), Pertamina has thus waived its sovereign immunity from attachment in United States courts.[12]

A. Attachment Under the FSIA and New York Law

The FSIA states that when a foreign state is not protected by sovereign immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In attachment actions involving foreign states, federal courts thus apply Fed.R.Civ.P. 69(a), which requires the application of local state procedures. *See Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A.,* 190 F.3d 16, 20 (2d Cir.1999) (applying Rule 69(a), and hence New York law, in an FSIA action).

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[12] Because this is an appeal from an order executing a judgment against the property of Pertamina—as opposed to the property of the Ministry or the Republic of Indonesia—the sovereign immunity claims of the Ministry or the Republic of Indonesia are not before us.

In the instant action, the district court is located in New York state. We therefore apply New York law to determine what assets are "subject to enforcement, and thus available to judgment creditors." *Alliance,* 190 F.3d at 20. "New York procedure for enforcement of judgments is set out in Article 52 of the Civil Practice Law and Rules. The first section of Article 52 describes the assets that New York law has made subject to enforcement, and thus available to judgment creditors." *Id.* The relevant provision, N.Y. C.P.L.R. § 5201(b), states that:

> **Property against which a money judgment may be enforced.** A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment.

Id. In New York, then, a party seeking to enforce a judgment "stand[s] in the shoes of the judgment debtor in relation to any debt owed him or a property interest he may own." *Bass v. Bass,* 140 A.D.2d 251, 253, 528 N.Y.S.2d 558, 561 (1st Dep't 1988). Nonetheless, a party cannot "reach . . . assets in which the judgment debtor has no interest." *Id.* A determination of Pertamina's property interest in the disputed funds—i.e., whether Pertamina can "assign or transfer" any of these funds—is therefore dispositive of this appeal. N.Y. C.P.L.R. § 5201(b).

B. Ownership of the Disputed Funds

While the litigants agree that New York law governs what property can be attached, they diverge on what law governs the property rights of the Republic of Indonesia and Pertamina in the disputed funds. KBC argues that

under New York law, Pertamina owns the Production Sharing Percentage because Pertamina controlled the allocation of the funds within the trust accounts and retained initial title to the LNG, which it sold to generate the disputed funds. KBC finds no significance in the fact that much of those funds flow to the Republic of Indonesia. In KBC's view, these funds merely represent "various royalties, taxes, and dividends" which "Pertamina is obligated to pay the Government." Decl. of Robert N. Hornick ¶ 24. KBC argues that before those obligations are met, the funds belong to Pertamina. KBC's expert also argues that Indonesian **[84]** law does not vest the Republic of Indonesia with any ownership interest in these funds. *See id.* at ¶¶ 24-49.

Both Pertamina and the Ministry argue to the contrary that Indonesian law deprives Pertamina of all but a future property interest, limited to five percent of the Net Operating Income, while the Republic of Indonesia has the exclusive right to the rest of Pertamina's Production Sharing Percentage. They, like the district court, identify Government Regulation 41 as providing the dispositive rule of decision:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article *shall be the Government's portion.*

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5 (emphasis added). According to

Pertamina's expert, "[t]his [provision] means that the Government owns the Percentage Share due to Pertamina under the PSC, but must pay Pertamina the five percent fee," or the Retention. Supp. Decl. of Sudargo Gautama ¶ 4.

Pertamina also argues that even the Retention, which equals five percent of the Net Operating Income, cannot be attached. Pertamina contends that before it transfers its Production Sharing Percentage to the Republic of Indonesia, the latter *owns* all the PSC Revenue as a result of Government Regulation 41. Only after the revenue reaches Jakarta does Pertamina receive the Retention. And even in Jakarta, Pertamina is not entitled to the entire Retention. Regulation 41, in Article 5(3), subjects the retention to a sixty percent tax. A second regulation, Government Regulation 73, then mandates payment of a fifty percent dividend to the government. In all, Pertamina actually receives one-fifth of the Retention.[13]

Resolution of this appeal requires that we determine the legal ownership of the PSC Revenues. At the threshold, we must consider which choice of law rule governs the question of ownership.

IV. Choice of Law Analysis

A. Federal or State Choice of Law Rules

"[R]ather than directing courts to apply the choice of law rules of the place of [the relevant events], the FSIA

[13] For instance, if the PSC Revenue were $100, the Pertamina's retention would be $5, or five percent. Under the terms described in Pertamina's annual reports, though, the PSC Revenue would be divided: $35 would go to the PSC contractor, and $65 would go to Pertamina in New York, then be transferred immediately to the Ministry in Jakarta. Once the $65 reached Jakarta, Pertamina would receive $5. After taxes and dividends, however, Pertamina would only retain $1.

implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law." *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir.1991); *accord Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir.1996) ("[T]he FSIA ... operates as a 'pass-through' to state law principles."). In *Barkanic*, we reasoned that the FSIA "expressly embraces the goal of holding foreign states liable in the same manner and to the same extent as a private individual under like circumstances." *Barkanic*, 923 F.2d at 960 n. 3 (internal **[85]** citation and quotation marks omitted). *Barkanic* suggests that New York choice of law rules govern.

The Ministry argues that *Barkanic* applies only to questions of "liability," and does not extend to questions about "the amenability of the sovereign to suit." Ministry Reply Br. at 16. The latter questions, the Ministry argues, are governed by federal common law choice of law rules. *Id.* (emphasis omitted). But in *Barkanic*, we explained that in FSIA cases, we use the forum state's choice of law rules to resolve "*all* issues," except jurisdictional ones. *Barkanic*, 923 F.2d at 959, 961 (emphasis added). Determining what property Pertamina owns is not a jurisdictional question, which would require application of federal law. Jurisdiction has already been established pursuant to 28 U.S.C. § 1610(b)(1) by the contractual waiver of immunity. Like the *Barkanic* court, we now determine only the scope of recovery.[14] New York choice of law rules therefore govern our decision.

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[14] Any "resort to federal common law to fill the interstices of our federated legal system, must be warranted by overriding and compelling federal concerns." *Pescatore*, 97 F.3d at 10 (citation and internal quotation marks omitted); *accord O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (noting that "cases in which judicial creation of a special federal rule would be justified

B. New York or Indonesian Property Law

Under New York law, "[t]he first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. & Stolarz,* 81 N.Y.2d 219, 223, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904, 905 (1993); *accord Curley v. AMR Corp.,* 153 F.3d 5, 12 (2d Cir.1998). In property disputes, if a conflict is identified, New York choice of law rules require the application of an "interests analysis," in which "the law of the jurisdiction having the greatest interest in the litigation [is] applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Koreag, Controle et Revision S.A. v. Refco F/X Assoc. Inc.,* 961 F.2d 341, 350 (2d Cir.), *cert. denied,* 506 U.S. 865, 113 S.Ct. 188, 121 L.Ed.2d 132 (1992) (citation omitted); *see also Istim, Inc. v. Chemical Bank,* 78 N.Y.2d 342, 348, 581 N.E.2d 1042, 1044, 575 N.Y.S.2d 796, 798 (1991) (applying interests analysis); *In re Estate of Clark,* 21 N.Y.2d 478, 485-86, 236 N.E.2d 152, 156, 288 N.Y.S.2d 993, 998 (1968) (same); *In re Crichton's Estate,* 20 N.Y.2d 124, 133, 228 N.E.2d 799, 805-06, 281 N.Y.S.2d 811, 819 (1967) (same); *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank,* 279 A.D.2d 408, 408-09, 720 N.Y.S.2d 102, 103-04 (1st Dep't 2001) (same).[15]

. . . are . . . few and restricted") (citation and internal quotation marks omitted). The Ministry's proffered interest, the uniform application of federal law, Ministry Reply Br. at 16, is "insufficient to justify imposition of federal common law," because of its "generic" and "generalized" nature. *Pescatore,* 97 F.3d at 11 (citing *O'Melveny,* 512 U.S. at 88, 114 S.Ct. 2048).

[15] KBC argues that "the law of the situs of the disputed property generally controls." Appellee's Br. at 34. (citing 19A N.Y. Jur.2d Con-

1. Actual Conflict of Law. In the case at bar, the Republic of Indonesia and the State of New York apply the same general rules to property disputes. The Republic of Indonesia offers the only specific rules—Indonesian statutes and regu-**[86]**lations—that determine the respective rights of Pertamina and the Republic of Indonesia in the disputed funds. New York law directs us to apply these Indonesian statutes and regulations. There is thus no actual conflict of law.

Under New York law, the party who possesses property is presumed to be the party who owns it. *See Pollock v. Rapid Indus. Plastics Co.,* 113 A.D.2d 520, 525, 497 N.Y.S. 2d 45, 49 (2d Dep't 1985) (noting that "possession of tangible property . . . creates a rebuttable presumption of ownership"). When a party holds funds in a bank account, possession is established, and the presumption of ownership follows. *See Kolodziejczyk v. Wing,* 261 A.D.2d 927, 928, 689 N.Y.S.2d 825, 825 (4th Dep't 1999) (joint bank account creates rebuttable presumption of ownership in joint possessors); *Perkins v. Guaranty Trust Co. of New York,* 274 N.Y. 250, 261, 8 N.E.2d 849, 853 (1937) (possession of stock certificates creates rebuttable presumption of ownership).

Similarly, the Indonesian Civil Code provides that "whoever is in control of movable goods . . . shall be deemed to be the owner of such goods," Indonesian Civ. Code, art.1977, and the phrase "movable goods" includes cash held in bank accounts, Decl. of Robert N. Hornick ¶ 34.

Pertamina possesses the disputed funds. Under both New York and Indonesian law, we therefore proceed from the presumption that Pertamina owns the disputed funds. It

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flict of Laws §§ 26, 27, 31). But the New York Court of Appeals explicitly rejected the "traditional situs rule" in favor of interest analysis in *Istim*, 78 N.Y.2d at 347, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798.

is clear, however, that this presumption may be rebutted by evidence that the Republic of Indonesia actually controlled the disputed funds, or that Pertamina merely held the funds for the Republic of Indonesia, in the manner of a trustee.[16] *See Fragetti v. Fragetti,* 262 A.D.2d 527, 527-28, 692 N.Y.S.2d 442, 443 (2d Dep't 1999) (holding that joint bank account created presumption of joint ownership, which was rebutted by contrary evidence of the parties' intentions and relative control over the funds); *Vergari v. Kraisky,* 120 A.D.2d 739, 740, 502 N.Y.S.2d 788, 789 (2d Dep't 1986) (holding that certificate of title constituted prima facie evidence of ownership of a vehicle, which was rebutted by contrary evidence of the parties' relative dominion and control over the vehicle); *Kurtish v. Iskokovic,* 204 A.D.2d 847, 848, 612 N.Y.S.2d 263, 264 (3d Dep't 1994) (holding that a "constructive trust" exists between two parties when there is: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment); *Mendel v. Hewitt,* 161 A.D.2d 849, 850, 555 N.Y.S.2d 899, 900 (3d Dep't 1990) (stating that to determine whether a "constructive trust" exists, courts conduct "flexible" factual inquiries into the relationships between parties); *cf.* Decl. of Robert N. Hornick ¶ 34 (stating that under Indonesian law, possession establishes a presumption of ownership, but not stating that the presumption is irrebuttable). Under New York law, then,

16 As the district court stated, Pertamina's possession of the disputed funds "is not the end of the story. Under absolute Hornbook law, the Court must look past that and must recognize any property rights in that money which belong to any other parties . . . such as the right of a beneficiary to a trust or some similar kind of property right." Tr. of April 5, 2002 Hearing, at 80. KBC does not advance any contrary proposition of Indonesian law. *See* Petitioner-Appellee's Br. at 41, 44.

the property rights are determined by the underlying relationship between Pertamina and the Republic of Indonesia.

KBC urges us to apply New York law to this relationship, and thus, to the property rights in the disputed funds. Yet KBC has not pointed to any New York cases or statutes that purport to govern this kind of **[87]** arrangement. The Republic of Indonesia is a foreign state, and Pertamina is a corporate entity of Indonesia, created by the legislative enactments and executive orders of the Republic of Indonesia. The relationship was created neither by contract nor by any other mechanism familiar to the laws of New York. It was established instead by provisions of Indonesian law uniquely applicable to the relationship itself: Law of the Republic of Indonesia Number 8 Year 1971 and Government Regulation of the Republic of Indonesia Number 41 of 1982. Under New York law, the meaning of these two provisions of Indonesian law determines the property rights of the parties. There is thus no actual conflict between the laws of New York and the laws of Indonesia.

2. *Interests Analysis.* In any event, even if there were such a conflict, we are confident that Indonesian law would govern under the "interests analysis" that would be applicable under New York choice of law rules. *Cf. Allstate,* 81 N.Y.2d at 225, 613 N.E.2d at 938, 597 N.Y.S.2d at 906 (holding that "there is no conflict between New York and New Jersey law," and that even if there were a conflict, "New Jersey law [would] govern[ ]"). As the New York Court of Appeals has explained,

> Applying interests analysis, we first look to the purposes of the statutes in conflict and identify the policies which the States seek to promote through application of their laws. Then, based upon the facts of

> the case which relate to the statutes' purpose, we determine which State has the greater interest in having its law applied.

Istim, 78 N.Y.2d at 348, 581 N.E.2d at 1044, 575 N.Y.S.2d at 798. In the case at bar, Indonesian law sets forth a set of rules specifically resolving the ownership and disposition of the particular funds in dispute. *See, e.g.,* Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5; Law of the Republic of Indonesia Number 8 Year 1971, Art. 15; *see also* Decl. of Sudargo Gautama ¶¶ 29-39 (describing the regulation of PSC revenues). More generally, Indonesian laws also reflect a significant national interest in the eventual fate of funds from LNG exploitation. An Indonesian Constitution "Elucidation" observes, "The earth and the waters and the natural riches contained therein are the fundamentals of the people's prosperity. Therefore they should be controlled by the State and be made use of for the greatest possible prosperity of the people." Elucidation of the Indonesian Const., Art. 33. Other Indonesian laws evince similar concerns. *See* Law Substituting Gov't Regulation No. 44 Year 1960; Law of the Republic of Indonesia Number 8 Year 1971. And, unlike New York's interests, Indonesia's interests implicate the particular circumstances at issue: the use of an Indonesian governmental instrumentality to generate funds in order to maintain satisfactory foreign exchange reserves.

In contrast, the New York statutory interests implicated here are relatively attenuated: (i) the creation and operation of trusts under New York law; (ii) the execution of sales contracts that operate under New York law to obtain funds for deposit in these trusts; (iii) New York's general

interest "in defining and protecting the property interests of its citizens and those who do business there," *Koreag*, 961 F.2d at 351; and (iv) New York's "interest as an international clearinghouse and market place," *Indosuez*, 279 A.D.2d at 408-09, 720 N.Y.S.2d at 104 (citation and internal quotation marks omitted).

Moreover, these generic interests are only minimally implicated in this case. Both the LNG sales contracts and the **[88]** trust mechanism complete their operations before funds arrive in Pertamina's subaccount. Whatever interest New York has in proper application of its contract or trust law has *de minimis* application here. And we do not see how a decision to apply New York law would materially further New York's reputation as a cosmopolitan, as opposed to insular and provincial, financial center. Indeed, if this latter reason alone sufficed to mandate New York law, courts would never apply foreign law to cases involving property located in New York bank accounts, which has clearly not been the case. *Cf., e.g., Clark*, 21 N.Y.2d at 485-86, 236 N.E.2d at 156, 288 N.Y.S.2d at 998 (applying Virginia law to determine the ownership of property located in New York).

We conclude that even if there were a conflict between New York and Indonesian law, New York choice of law rules would mandate application of Indonesian law to determine the relative property interests of Pertamina and the Republic of Indonesia in the disputed funds.

V. The Property Interests of the Republic of Indonesia and Pertamina in the Restrained Funds

There is some uncertainty about the theory pursuant to which KBC presses its claim to the attached funds. On the one hand, KBC argues that the disputed funds belong to

Pertamina even as a matter of Indonesian law, and consequently can be attached. This theory of recovery therefore rests on the ownership of the disputed funds. On the other hand, KBC, in its brief and at oral argument, also suggested that it had been entitled to rely on Pertamina's ownership of the LNG funds, and due to that reliance, is now entitled to attach those funds, without regard to the funds' legal ownership.

We reject both arguments. Like the district court, we conclude that under Indonesian law, all of the disputed funds except for the Retention belong to the Republic of Indonesia, and that it would have been unreasonable for KBC to rely on the notion that Pertamina owned those funds.

A. The Reliance Argument

KBC's reliance argument appears to run as follows: The Republic of Indonesia has established Pertamina as a separate legal entity, comparable to a private corporation, in order to do business with various other entities in international markets. When those entities make serious claims against Pertamina's assets, however, Pertamina disclaims ownership, and invokes the sovereign immunity protections of the Republic of Indonesia. KBC hints that Pertamina was a vehicle for the Republic of Indonesia to participate in international markets without fairly accepting the consequences of such participation.

This argument rests on the premise that when KBC entered into the geothermal energy contracts, KBC relied upon Pertamina's ownership of the disputed funds, and that it was reasonable for KBC to do so. We can find no evidence in the record to support these claims.

KBC has not elicited evidence from which a court could conclude that KBC actually relied upon any representation that Pertamina made about KBC's ability to recover from the disputed funds in the event of default. KBC does not allege that before or during the negotiation of the geothermal energy contracts, Pertamina made any oral or written representation about recovery in the event of default. The geothermal energy contracts contain no reference to Pertamina's obligations to make funds available in the event of default, nor do they make any mention of [89] LNG revenues. Neither Pertamina's separate legal status nor its previous title to the LNG supports the notion that Pertamina represented that it owned the disputed funds, or that the funds were available to KBC to satisfy a default. Moreover, neither fact establishes that Pertamina owns the proceeds from LNG sales, free of any prior obligations to the Republic of Indonesia.[17]

None of Pertamina's representations and actions, as reflected in the record, support the inference that Pertamina had an ownership interest in the disputed funds. To the contrary, Pertamina seems to have been entirely forthright about its lack of ownership rights. Pertamina's annual

[17] Nor can KBC rely on the structure or denomination of the disputed accounts at issue here to establish reliance. There is no evidence that KBC knew of the existence of the Bank of America trust accounts, let alone that it relied on their existence when contracting. KBC sought permission from the United States District Court for the Southern District of Texas to register its judgment in Delaware and California in addition to New York. Memorandum and Order of February 20, 2002, at 7. In New York alone, KBC served restraining notices on no less than seven banks. Writ of Execution and Order to Show Cause of February 22, 2002, at 5. This broadside approach suggests that KBC, while perhaps aware that LNG revenues existed and flowed through New York, knew nothing of these accounts, let alone who established or controlled them.

report, for example, states that "[r]evenue from LNG sales, after deduction of contractually agreed cost items, is shared between the Government (65%) and the contractor (35%). From the LNG operations *PERTAMINA earns one thirteenth ($^1/_{13}$) or approximately 5% from the Government's share.*" *Pertamina Annual Financial Report 2000,* at 17 (emphasis added).

Although the TPAAs do not denominate the Republic of Indonesia as owner of the LNG proceeds, Pertamina presents undisputed evidence that it has consistently transferred all of its Production Sharing Percentage to the Republic of Indonesia's account at the Federal Reserve Bank of New York. And it was widely understood that the Republic of Indonesia relied on LNG funds to maintain its foreign currency reserves, which would have been more difficult had the funds belonged to Pertamina, rather than the Republic itself. *See* Decl. of Sahala L. Gaol. ¶¶ 11-12.

Further, the evidence of the LNG contracting process suggests that other persons dealing with Pertamina thought that Pertamina could not be relied on as a creditor. The LNG financing structure was designed to assure parties contracting with Pertamina that—while doing *LNG business* with Pertamina—they would not be left without financial recourse in the case of default. For instance, when money was needed to construct Pertamina's liquefaction facilities, the loan was *not* made directly to Pertamina. Rather, it was made to the trustee, Bank of America. The loan contracts described the "Borrower" as "Bank of America National Trust and Savings Association, solely as Trustee under the Trust Agreement [but] not in its individual capacity" and not "any one or more of the Producers [defined to include Pertamina]." Bontang VI Loan Agreement of March 4, 1997, at 4. The loan agreements further

specified that debt payments must be made from the LNG proceeds in the trust *before* Pertamina or the PSC contractor obtained any profit. *Id.* at 18-19. The loan agreements therefore warranted that the borrowers' interest had priority over all other "obligations and liabilities," *id.* at 38, and the TPAAs provided for payment to Pertamina and the PSC contractor only *after* such debts were satisfied, *see, e.g.*, Bontang VI Trustee and Paying Agent Agreement of March 4, **[90]** 1997, at 39. PSC contractors' interests were also protected through the trust such that they did not need to rely on access to Pertamina's assets in order to be paid. *See* Decl. of Ainun Na'im ¶22; Decl. of Robert Hornick ¶23(c). The TPAA mechanism thereby ensured that parties involved in the production of LNG never needed to rely on the independence and financial viability of Pertamina nor contend with Pertamina's potential sovereign immunity assertions, nor its willingness to comply with adverse judgments.

Other sophisticated commercial counter-parties thus expressly sought contractual mechanisms to guarantee recovery without reliance on the accessibility of Pertamina's assets. This suggests that even if KBC had actually relied upon Pertamina's ownership rights, such reliance would not have been reasonable. Others were aware of complexities in the relationship between Pertamina and the Republic of Indonesia, and consequent limits on Pertamina's ability to satisfy judgments against it. We would think that KBC, no less than others, could have arranged similar protections. Having failed to bargain for such protection before the fact and having failed to identify any actual reliance, KBC now asks us in effect to rearrange *nunc pro tunc* the relations of Pertamina and the Republic of Indonesia in KBC's favor. In these circumstances, we

see no reason why a sophisticated commercial entity should not be required to abide by the consequences of its bargain. We therefore reject KBC's reliance argument.

B. The Property Interest Argument

As described above, the crux of the parties' disagreement about Indonesian law hinges on a provision of Government Regulation 41:

> Article 5 (1) The retention (fee) received by Pertamina with regard to the Production Sharing Contract shall be 5% (five percent) of the Net Operating Income of the relevant Production Sharing Contract.
>
> (2) The difference between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina as intended in paragraph (1) of this Article shall be the Government's portion.

Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5. This provision, by using the possessive "Government's," mandates that all of the disputed funds, with the exception of the five percent that constitutes Pertamina's Retention, belong to the Republic of Indonesia. Thus, we agree that most of "the share denominated as 'Pertamina's' share under the PSCs belongs entirely to the Government," Decl. of Sudargo Gautama ¶ 4, with the exception of the Article 5(1) Retention. KBC responds that "the 'Government's Portion' referenced in [Government Regulation 41] is not a property interest [but] simply a reference to the 'indebted obligations' [already] owed by Pertamina to the Government of Indonesia." Petitioner-Appellee's Br. at 46 (emphasis omitted). KBC contends that Law 8, the statute under which Regulation 41

was passed, creates these "indebted obligations." *Id.* at 14-16. Article 15 of Law 8 states that Pertamina's deposit of sixty percent of Net Operating Income from PSCs "shall constitute the payment" of corporate tax, various levies, and other contributions. Law of the Republic of Indonesia Number 8 Year 1971, Art. 15. KBC argues that the amount that Pertamina owes to Indonesia in taxes, levies, and contributions is the "Government's portion." The disputed funds are, in KBC's view, owned by Pertamina and owed to Indonesia.

[91] But KBC's interpretation of Article 5 of Government Regulation 41 is inconsistent with the surrounding statutory text. While Article 5(2) identifies in mandatory terms what "shall be the Government's portion," the very next provision imposes a "tax," which it explicitly labels as such. Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5(3). The presence of a parallel provision explicitly referencing "tax" obligations suggests that Article 5(2) describes a different kind of obligation. The terminology of Article 15 of Law 8 underscores this inference: It refers to payments that "constitute" corporate taxes, customs levies, and the like, Law of the Republic of Indonesia Number 8 Year 1971, Art. 15, which are distinguished from other obligations.

Further, Article 5(2) of Government Regulation 41 and Article 15 of Law 8 refer to different amounts. The former, which creates the "Government's portion," refers to the "*difference* between portions received by Pertamina according to each Production Sharing Contract and the retention (fee) received by Pertamina." Government Regulation of the Republic of Indonesia Number 41 of 1982, Art. 5 (emphasis added). That is, the Government portion comprises, with respect to each PSC, the total amount of the Net Operating Income, *less* the amount to which the

particular PSC contractors are entitled, *less* five percent of the Net Operating Income—a sum that depends upon the exact percentage to which contractors are entitled under the PSC. And, as KBC's counsel explained at oral argument, this percentage varies from contract to contract, so that the "Government's portion" also varies above and below sixty percent of Net Operating Income. Thus, the "Government's portion" is a varying amount.

Article 14 of Law 8, in contrast, refers to a *fixed* "sixty percent of the net operating income from the operations of Production Sharing Contracts prior to the division between the Enterprise and the Contractor." Law of the Republic of Indonesia Number 8 Year 1971, Art. 14. The *fixed* sixty percent that is Law 8's "indebted obligation" therefore cannot be the same thing as the *varying* percentage of the Net Operating Income that is the "Government's portion."[18]

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[18] Despite this discrepancy, KBC's expert argues that "Article 14 and 15 [of Law 8] were implemented by [Government Regulation 41]." Decl. of Robert Hornick ¶27. But as a matter of Indonesian law, government regulations are not implementing mechanisms for legislation. Indonesian law contains "a bewildering variety of types of laws—statutes, regulations, decrees, circulars, etc." Eddy Damian & Robert N. Hornick, *Indonesia's Formal Legal System: An Introduction*, 20 Am. J. Comp. L. 492, 523 (1972). Among the varieties of law enumerated in the aforementioned article are "Government Regulation[s]," "Presidential Decision[s]," "Regulation[s] of the Minister," and "internal memoranda." *Id.* at 524-25. This plethora of legal instruments in part ensues because the Indonesian executive branch has "considerably more executive law-making discretion than is the case, e.g. in the legal system of the U.S." *Id.* at 529. And under Indonesian law, "[e]ven statutes passed by the House of Representative commonly look[ ] to the executive orders and Presidential speeches for their inspiration and legal base." *Id.* at 507. Given the discrepancy in meaning between Law 8 and Government Regulation 41, we conclude that these rules do not exist in the hierarchal relationship described in the declaration of KBC's expert.

The record also contains uncontroverted evidence that Pertamina's share of the Net Operating Income is transferred directly to the Ministry's account at the Federal Reserve Bank of New York.[19] While this [92] does not prove that the Republic of Indonesia has an ownership interest in such funds, it is consistent with such a conclusion.

We also agree with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference. *See, e.g., Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir.1999), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000) ("Recognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations."); *see also In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir.1992) ("A court of the United States owes substantial deference to the construction France places upon its domestic law."). That Indonesia is a party to the case does not blunt this comity concern. *See Société Nationale Industrielle Aérospatiale v. United States Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987) ("[W]e have long recognized the demands of comity in suits involving foreign states, either as *parties* or as sovereigns with a coordinate interest in the litigation." (emphasis added) (citing *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139,

[19] Pertamina introduced testimony that its long-standing practice has been to hand over funds from PSCs directly to the Republic of Indonesia through a transfer to the Federal Reserve Bank of New York. *See* Decl. of Ainun Na'im ¶23 (noting that "standing instructions to [Bank of America exist] to pay its Production Sharing Percentage to the account of the Government of Indonesia"); Supp. Decl. of Sahala L. Gaol. ¶3 (same). Such standing instructions were given in March 1997, prior to the Swiss arbitration in the case at bar. *Id.*

40 L.Ed. 95 (1895))). Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas. The Republic of Indonesia, of course, insists that Pertamina's reading of the relevant Indonesian law is correct. We thus conclude that Pertamina does not own any portion of the disputed funds, with the exception of the Retention. Like a trustee, Pertamina possesses the remaining funds but has no ownership interest in them. *Cf. Wulff v. Roseville Trust Co.*, 164 A.D. 399, 404-05, 149 N.Y.S. 683, 687 (1st Dep't 1914) ("Property which a debtor holds in trust for others ... is not subject to an attachment issued against his property.").

C. The Retention

Pertamina also argues that it has no right to the Retention, or, at a minimum, no right to eighty percent of the Retention. We disagree. While Pertamina may be under an obligation to transfer the Retention to the Ministry's account in New York, this fact does not alter the extant allocation of ownership interests. Pertamina has not identified any Indonesian statute or regulation that grants the Republic of Indonesia ownership rights in the Retention. "[U]nder New York law, a defendant has an interest in ... funds if any part of the money is within the present or future control of the defendant." *Gala Enterprises, Inc. v. Hewlett Packard Co.*, 970 F.Supp. 212, 217 (S.D.N.Y. 1997) (citation and internal punctuation omitted); *accord Leon v. Martinez*, 84 N.Y.2d 83, 88 n. 1, 638 N.E.2d 511, 513 n. 1, 614 N.Y.S.2d 972, 974 n. 1 (1994) ("An assignment may properly relate to a future ... right which is adequately identified...."). As property within Pertamina's

control, which only Pertamina controls, the Retention is validly subject to attachment.

CONCLUSION

The district court correctly adjudicated the relative ownership interests of the Republic of Indonesia and Pertamina. We therefore affirm the district court's order [93] granting KBC's motion to attach the Retention and denying KBC's motion to attach the remainder of the disputed funds. Because this is not an appeal from a final judgment, proceedings in the district court will presumably move on to other matters. We direct the district court, in the course of those proceedings, to continue the stay presently in force or to substitute one similar until such time as the parties' rights to the disputed funds are finally determined.

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van Murtha, J., affirmed, and mortgagee appealed. The Court of Appeals held that certification of question to the Vermont Supreme Court was warranted, inquiring: Where a recorded mortgage was not witnessed, does the filing of a foreclosure complaint suffice under Vermont law to give subsequent purchasers constructive notice of that mortgage and thereby make it valid and binding on subsequent purchasers?

Certification of question ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M-18-302 (TPG)

In the Matter Of An Arbitration Between

Karaha Bodas Company, L.L.C.,

Petitioner,

v.

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),

Respondent.

FINAL ORDER

1. On February 22, 2002, petitioner Karaha Bodas Company, L.L.C. ("KBC") registered in this District a final judgement against respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") that was entered on December 4, 2001 by the United States District Court for the Southern District of Texas (the "Texas Judgment"). The Texas Judgment confirmed the final arbitral award entered in *Karaha Bodas Company v. Pertamina & Others*, YD/IS 60 319, pursuant to the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, U.S.T. 2517, T.I.A.S. No. 6997, codified at 9 U.S.C. §§ 201-208, which awarded KBC $261,166,654.92, plus interest from January 1, 2001. Pertamina is an Indonesian state-owned oil and gas enterprise.

2. On February 22, 2002, this Court issued on an *ex parte* basis two Writs of Execution and Orders to Show Cause, pursuant to which the Court: (a) permitted KBC to issue restraining notices (the "Restraining Notices"), which KBC served pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of New York Civil Practice Law and Rules ("CPLR") upon the banks listed in paragraph 3 (the "Garnishee Banks"), which Garnishee Banks KBC alleged held funds owed to Pertamina or on which Pertamina had an interest; (b) authorized certain discovery; and c) ordered Pertamina to show cause why KBC could not execute upon any property of Pertamina within this jurisdiction in satisfaction of the judgement.

3. KBC served the restraining notices upon the following garnishee banks in New York:

Bank of America Corporation f/k/a Bank International
Bank of America National Association
Bank of America Securities
Bank of New York
Chase Securities, Inc.
Dai-Ichi Kangyo Bank, Ltd.
JP Morgan Chase Bank
Bank Indonesia
Bank of Montreal Trust Company
Bank of Taiwan New York Agency
Bank Rakyat Indonesia
PT Bank Central Asia (Persero)
PT Bank Negara Indonesia (Persero) Tbk
PT Bank Mandiri (Persero)

4. On March 25, 2002, the Ministry of Finance of the Republic of Indonesia (the "Ministry") appeared to contest ownership of restrained assets, and to that end filed a motion

to quash (the "Motion to Quash") the Restraining Notices, the Writs of Execution and Orders to Show Cause, and the subpoenas issued by KBC seeking discovery from the Garnishee Banks. The Motion to Quash was fully briefed.

5. On March 23, 2002, Pertamina filed an Opposition to KBC's Writs of Execution and Orders to Show Cause. KBC filed a reply on April 2, 2002.

6. On April 5, 2002 this Court conducted a hearing on: (i) the Order to Show Cause, and (ii) the Ministry's Motion to Quash.

7. For the reasons stated in open court on April 5, 2002, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

A. Trust Accounts Holding Pertamina's Production Sharing Percentage of Gas Sales Revenues

8. The trust accounts listed in this paragraph at the identified Garnishee Bank below: (a) are established pursuant to various Trustee and Paying Agent Agreement; (b) relate to natural gas production projects in Indonesia conducted pursuant to Production Sharing Contracts; (c) contain revenues from natural gas, liquefied natural gas ("LNG") and liquid petroleum gas ("LPG") sales by Pertamina; and (d) are held in Pertamina's name and are subject to the Retention Fee as described in paragraph 12. These trust accounts are restrained under the Restraining Notices:

Trust accounts at Garnishee Bank of America, N.A.:

ARUN II Trust
ARUN III Trust
Bontang Excess Sales MCGC Trust
Bontang Excess Sales AQP Trust

Bontang Excess Sales Korea II Trust
Bontang Excess Sales KCO Trust
Bontang LPG PKG V Trust
Bontang LPG PKG VII Trust
Bontang II Trust
Bontang III Trust
Bontang IV Trust
Bontang V Trust
Bontang VI Trust
East Java Pipeline (PSC Revenue) Trust
ONWJ Trust

9. Each Trust in paragraph 8 above receives the sales proceeds arising out of specific Production Sharing Contracts; these sales proceeds are deposited by buyers into the appropriate trust fund account as required by contract. Pursuant to a specific Trustee and Paying Agent Agreement, the Trustee first makes payments and accruals for debt service, reserves, and other expenses and costs. The excess amount left in each general trust account after these payments are made (the "Net Operating Income") is distributed by the Trustee in accordance with the Production Sharing Percentages specified in the Production Sharing Contracts for each producer, a term defined for the Trustee and Paying Agent Agreements to include both Pertamina and the foreign contractors. A Trustee deposits each producer's share of the Net Operating Income in that producer's trust sub-account. Pertamina, as a producer, receives a share of each Production Sharing Contract.

10. The only trust and payment accounts and sub-accounts restrained are those maintained in Pertamina's name or for Pertamina's benefit.

11. Article 5(2) of Indonesian Government Regulation 41/1982 provides that the difference between the share nominally received by Pertamina according to each Production Sharing Contract and a Retention Fee payable to Pertamina as intended in Article 5(1) "shall be the Government's portion." (the "Government's portion")

12. Article 5(1) of Indonesian Government Regulation 41/1982 provides that Pertamina receives a retention fee out of the proceeds of each Production Sharing Contract. The Retention Fee is equal to five percent (5%) of the Net Operating Income that is generated from each such contract and that is paid to Pertamina and its production sharing partners (the "Retention Fee").

13. The Court finds that Pertamina has a property right in the trust accounts identified in paragraph 8 above, to the extent of its five percent (5%) Retention Fee, which can be executed upon in the manner allowed under New York C.P.L.R. 5222(b).

14. The Court finds that the Government of Indonesia does not have an ownership interest in any of the five percent (5%) Retention Fee, and that the provisions of Indonesian law providing for a tax and a dividend to be paid out of the five percent (5%) Retention Fee do not confer an ownership interest on the Government of Indonesia.

15. The Court finds that the Government of Indonesia has a property right in the "Government's Portion" under Article 5(2) of Government Regulation No. 41/1982 with respect to those funds held in Pertamina's name in the trust accounts identified in paragraph 8 above, and therefore, is entitled to these funds. The trust accounts cannot be executed upon to the extent of the Government's Portion.

16. Accordingly, the Ministry's Motion to Quash is GRANTED and KBC's Motion is DENIED with regard to the trust accounts listed in paragraph 8, as to the Government's Portion. KBC's Motion is GRANTED and the Ministry's Motion to Quash is DENIED only as to the amount of Pertamina's Retention Fee with regard to the trusts listed in paragraph 8.

17. In addition, to the trust accounts listed in paragraph 8, restraints have been placed on the following accounts:

Trust Accounts at Garnishee Bank of America, N.A.:

BLRE Trust
Cilacap Trust
Corridor Trust
East Java Pipeline (Throughput Fee) Trust
KMI Trust
South Sumatra Trust
West Natuna Trust

Trust Accounts at Garnishee Bank of New York:

Exor I Trust
MUSI II Trust

18. The Court finds that the present record is insufficient to determine whether KBC is entitled to execution against these accounts. These accounts, to some extent, raise individual factual issues and, in any event, do not involve the same uniform questions of law raised with respect to the trust accounts listed in paragraph 8.

19. The Court certifies that the order contained in paragraphs 8-16 involves controlling questions of law as to which there is substantial ground for difference of opinion

and that an immediate appeal from this order may materially advance the ultimate termination of the litigation.

20. The order contained in paragraphs 8-16 is stayed pending the conclusion of proceedings in the Court of Appeals.

Dated: New York, New York
April 24, 2002

/s/ THOMAS P. GRIESA
United States District Court Judge

28 U.S.C.A. § 1330

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C.A. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that

in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) (1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants and citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;
(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
(D) whether the action brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C.A. § 1391

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if

there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

> **(1)** in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

28 U.S.C.A. § 1441

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where

removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

> **(A)** the action could have been brought in a United States district court under section 1369 of this title; or
>
> **(B)** the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the

State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from

which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C.A. § 1602

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C.A. § 1603

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C.A. § 1604

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C.A. § 1605

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under

this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is

defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever

it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Sup-

pression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—**(A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;
(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or
(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C.A. § 1606

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C.A. § 1607

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C.A. § 1608

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk

of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C.A. § 1609

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C.A. § 1610

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liabil-

ity or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having

determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f) (1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the Inter-

national Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

28 U.S.C.A. § 1611

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought

under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

McKinney's CPLR § 5201

McKinney's Consolidated Laws of New York Annotated
Currentness
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight Of the Consolidated Laws
Article 52. Enforcement of Money Judgments (Refs & Annos)

—§ 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons

summoned and joint property of such persons with any other persons against whom the judgment is entered.

(c) Proper garnishee for particular property or debt

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8-112 of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

CREDITS

(L.1962, c. 308; amended L.1964, c. 298; § 1; L.1997, c. 566, § 20, eff. Oct. 10, 1997.)

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McKinney's CPLR § 5222

McKinney's Consolidated Laws of New York Annotated
Currentness
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight Of the Consolidated Laws
Article 52. Enforcement of Money Judgments (Refs & Annos)

—§ 5222. Restraining notice

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an

institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a

person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order.

(d) Notice to judgment debtor or obligor. If a notice in the form prescribed in subdivision (e) has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a nat-

ural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);

2. Social security;

3. Public assistance (welfare);

4. Alimony or child support;

5. Unemployment benefits;

6. Disability benefits;

7. Workers' compensation benefits;

8. Public or private pensions; and

9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

(f) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support, alimony or maintenance upon which a "default" as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article except that for the purposes of this section only a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty and paragraph b of subdivi-

sion nine of section two hundred thirty-six of the domestic relations law.

(g) Restraining notice in the form of magnetic tape or other electronic means. Where such person consents thereto in writing, a restraining notice in the form of magnetic tape or other electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon a person other than the judgment debtor or obligor. A restraining notice in such form shall contain all of the information required to be specified in a restraining notice under subdivision (a), except for the original signature or copy of the original signature of the clerk or attorney who issued the restraining notice. The provisions of this subdivision notwithstanding, the notice required by subdivisions (d) and (e) shall be given to the judgment debtor or obligor in the written form set forth therein.

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<LAWS 1962, CHAPTER 308>

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McKinney's CPLR § 5225

McKinney's Consolidated Laws of New York Annotated
Currentness
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight Of the Consolidated Laws
Article 52. Enforcement of Money Judgments (Refs & Annos)

—§ 5225. Payment or delivery of property of judgment debtor

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to

those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to effect payment or delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery.

<<CIVIL PRACTICE LAW AND RULES>>

<LAWS 1962, CHAPTER 308>

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Supreme Court, U.S.
FILED
AUG 2 - 2006
OFFICE OF THE CLERK

Nos. 05-1571 & 05-1573

IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Petitioner,

-and-

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a federal court bound to accept uncritically the self-interested interpretation of foreign law offered by a foreign-government litigant?

2. Whether the Court of Appeals erred in applying Rule 69 of the Federal Rules of Civil Procedure to determine the susceptibility of certain funds held by Pertamina in its own name to attachment and execution where Petitioners have identified no federal common law holding that Rule 69 is inapplicable in cases against foreign states.

STATEMENT PURSUANT TO RULE 29.6

Respondent Karaha Bodas Company, L.L.C. has no parent corporation and no publicly held company owns ten percent or more of its stock.

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INTRODUCTION

Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petitions for a Writ of Certiorari (the "Petitions") filed on June 7, 2006 by Petitioner PT Pertamina (Persero) (f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara) ("Pertamina") and by Petitioner Ministry of Finance of the Republic of Indonesia ("Government"). For all the reasons that follow, KBC respectfully submits that the Court of Appeals' decisions were correct in all respects, that there are no compelling reasons justifying a grant of *certiorari* by this Court, and that the Petitions should be denied in their entirety.

STATUTES AND RULE INVOLVED

In addition to the statutes identified in the respective Petitions, the following statutes are pertinent to the correct resolution of this case: Fed. R. Civ. P. 69; N.Y. C.P.L.R. § 5201; N.Y. C.P.L.R. § 5222. The relevant provisions of each of these statutes are reproduced at Resp't App. 1a-10a.

COUNTER-STATEMENT OF THE CASE

The instant Petitions mark the third time that Pertamina and the Government have sought to bring this straightforward commercial dispute before this Court. As described below, these Petitions are part of Pertamina and the Government's unrelenting effort to evade the rule of law and avoid payment of a lawful arbitration award rendered against Pertamina in 2000. Although Pertamina has revenues of over $20 billion, it resolutely refuses to pay the award or the U.S. judgment enforcing it. As part of their campaign to avoid Pertamina's legal obligation, Petitioners have used every available device

to challenge the decisions of the U.S. District Court for the Southern District of New York ("District Court") and the U.S. Court of Appeals for the Second Circuit ("Court of Appeals") that found Pertamina to be the owner of approximately $750 million of the over $8 billion that have passed through certain New York bank accounts since February 22, 2002.

While the Petitions purport to identify unresolved questions of federal law and to raise issues under the FSIA, 28 U.S.C. § 1601 *et seq.*, the decisions sought to be reviewed here were decided solely under New York and Indonesian law. The courts below acknowledged Indonesia's sovereign immunity at the threshold of these proceedings and ruled repeatedly that funds belonging to Indonesia were not subject to execution. Consequently, the remaining proceedings turned on Indonesian law principles governing Pertamina's ownership rights in the funds at issue, and on the construction of Article 52 of the New York Civil Practice Law and Rules, which governed KBC's enforcement rights in the funds. None of the arguments proferred by Pertamina and the Government justifies granting the Petitions.

The Arbitral Award and Confirmation Proceedings

On December 18, 2000, a Swiss arbitral tribunal awarded KBC $261.1 million as a result of Pertamina's breach of certain agreements related to the development of a geothermal energy plant in Indonesia. Because Pertamina refuses to pay the award, KBC has been forced to commence confirmation and enforcement proceedings in the United States, Hong Kong, Singapore, and Canada, and the arbitral award has been confirmed by the courts of each of those nations. As is pertinent here, the arbitral award was confirmed and

judgment was entered on December 4, 2001 by the United States District Court for the Southern District of Texas (the "Texas Judgment"). The Texas Judgment was affirmed by the United States Court of Appeals for the Fifth Circuit, whose order affirming the Texas Judgment this Court declined to review. *See Karaha Bodas Co. L.L.C. v. Pertamina*, 190 F. Supp. 2d 936 (S.D. Tex. 2001), *aff'd*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004). In addition to opposing KBC's attempts to enforce the arbitral award, Pertamina commenced annulment actions in the courts of Switzerland and Indonesia. Each of those actions was dismissed. *See Karaha Bodas Co., L.L.C. v. Pertamina*, 364 F.3d 274, 285 (5th Cir. 2004); Ruling, No. 01/BANDUNG/ WASIT.INT/2002, Sup. Ct. of Indon. (Oct. 4, 2004), at 43-44 (Resp't App. 13a-14a).

The New York Enforcement Proceedings

The instant Petitions seek to challenge the Court of Appeals' summary affirmance of the District Court's final judgment ruling that Pertamina is the owner of over $750 million in oil and gas revenues that have passed through Pertamina's bank accounts in New York, and that those revenues are subject to execution under New York law. The proceedings at issue in the Petitions began on February 22, 2002, when KBC registered the Texas Judgment in the District Court pursuant to 28 U.S.C. § 1963. Simultaneously with its registration of the Texas Judgment, KBC moved for, and the District Court issued, a writ of execution and restraining notices (the "Restraining Notices") pursuant to Fed. R. Civ. P. 69 and Section 5222 of the New York Civil Practice Law and Rules ("C.P.L.R."). The Restraining Notices were served on several New York banks including, *inter alia*, Bank of America and Bank of New York, and prohibited the

banks' transfer of funds from Pertamina's accounts. The writ of execution provided that KBC was entitled to execute upon "any property of Pertamina within this jurisdiction." Writ of Execution and Order to Show Cause at 2 (Feb, 22, 2002) (Resp't App. 19a).

Almost immediately following KBC's service of the Restraining Notices, the Government appeared (purportedly as a "non-party with interest") and claimed that it – not Pertamina – owned all the funds in Pertamina's accounts subject to the Restraining Notices (such funds, the "Restrained Funds"). As a result of the Government's competing ownership claim over the Restrained Funds, the District Court held several hearings (including an evidentiary hearing) over the course of two years to determine the ownership of the Restrained Funds and their susceptibility to execution and turnover to KBC.

The LNG Funds

At an initial hearing to consider the Petitioners' competing ownership claims, the District Court bifurcated the Restrained Funds into two groups. The District Court first considered the Restrained Funds resulting from Pertamina's liquefied natural gas ("LNG") operations (the "LNG Funds"). On April 26, 2002, the District Court ruled that Pertamina was the owner of a small portion of the LNG Funds known as the "Retention Fee." The District Court's ruling was based on an Indonesian law that expressly allocates the LNG Funds into a "Government Portion" and a "Pertamina Portion." The District Court held that the Indonesian Government owned the remainder of the LNG Funds, and that the LNG Funds owned by the Government were not subject to execution because the Government was not the judgment debtor.

The Court of Appeals affirmed the District Court's April 26, 2002 Order in all respects. The Court of Appeals first found that under Rule 69, it was required to "apply New York law to determine what assets are 'subject to enforcement, and thus available'" for execution by KBC. *Karaha Bodas Co., L.L.C. v. Pertamina*, 313 F.3d 70, 83 (2d Cir. 2002) ("*Karaha Bodas I*"). Like the District Court, the Court of Appeals then considered Section 5201 of the C.P.L.R., the New York law provision that defines the types of property against which a judgment creditor may enforce a judgment. After considering the language of Section 5201 and New York decisional law construing it, the Court of Appeals, like the District Court, concluded that KBC's right to execute upon the LNG Funds was dependent upon Pertamina's property interest in the LNG Funds. Specifically, the Court of Appeals found that, under Section 5201, KBC was entitled to execute upon any portion of the LNG Funds that Pertamina could "assign or transfer," including any future interest in the LNG Funds.

Finding that the parties agreed that New York law governed the question of what types of property could be attached, the Court of Appeals considered whether Pertamina's ownership interest in the LNG Funds was properly defined by New York or Indonesian law. Applying New York choice-of-law principles, the Court of Appeals found (a) that there was no actual conflict between New York law and Indonesian law insofar as they affected Pertamina's property interest, and (b) that even if there were a conflict between New York and Indonesian law, "New York choice-of-law rules would mandate application of Indonesian law to determine the relative property interests" of Pertamina and Indonesia in the disputed funds. *Karaha Bodas I*, 313 F.3d at 88.

Applying relevant Indonesian law principles, the Court of Appeals found that Pertamina owned the Retention Fee and that the Retention Fee was subject to execution by KBC. Specifically, the Court of Appeals found that Article 5 of Indonesian Government Regulation 41 established a "Government Portion" of the LNG Funds, and that this portion – consisting of all the LNG Funds except the Retention Fee – was owned by Indonesia. As for the Retention Fee, the Court of Appeals found that Pertamina had a future interest in the percentage of the LNG Funds comprising the Retention Fee, and that under Section 5201 of the C.P.L.R., this future interest – which the Court of Appeals characterized as "property within Pertamina's control, which only Pertamina controls" – was subject to execution. *Karaha Bodas I*, 313 F.3d at 92.

Both the District Court and the Court of Appeals conducted a thoroughgoing analysis of the relevant principles of Indonesian law in making their ownership determinations. The District Court accepted and relied upon the declarations of Indonesian law experts proffered by both KBC and the Government, and the Court of Appeals relied upon these declarations as well. Furthermore, while ultimately rejecting petitioners' argument that Pertamina lacked an executable interest in the Retention Fee, the Court of Appeals noted its agreement with its sister circuits that the Government's proffered interpretation of Indonesian law was entitled to deference, but not conclusive effect.

Pertamina and the Government filed respective Petitions for a writ of *certiorari* from this Court. Both Petitions were denied on June 2, 2003.

The Refinery Funds

Following its adjudication of the LNG Funds, the District Court directed the parties to make submissions concerning the ownership of the second category of funds held in Pertamina's name, which consist of revenues from Pertamina's sale of refined petroleum products to purchasers outside Indonesia (the "Refinery Funds"). As it had with the LNG Funds, the Government claimed to own all the Refinery Funds, although its claim relied on a different set of Indonesian laws than had governed ownership of the LNG Funds. The Government claimed that because the "BBM System" established under Indonesian law requires Pertamina to sell petroleum domestically on a "no-profit no-loss" basis (with the Government responsible for compensating Pertamina for any losses), Pertamina's revenues from export sales are constructively owned by the Government. The Government's initial motion seeking release of the restrained Refinery Funds identified two specific provisions of Indonesian law in support of its ownership claim; in the course of briefing KBC's motion for turnover of the Refinery Funds, however, the Government later identified no fewer than five additional laws that it claimed supported its position.

The District Court held a two-day evidentiary hearing on the Refinery Funds in October 2004. During that hearing, the District Court took evidence from KBC's expert on Indonesian law and from the Government's witness, a government auditor who gave extensive testimony concerning the use and accounting treatment of the Refinery Funds. Despite having specifically requested the opportunity to do so, neither Pertamina nor the Government called a witness to offer testimony concerning the Indonesian laws

that the Government claimed vested ownership of the Refinery Funds in the Government.

At the conclusion of the hearing, the District Court ruled from the bench that the Refinery Funds were completely within Pertamina's possession and control, and consequently, that they were owned by Pertamina and subject to execution pursuant to C.P.L.R. § 5201 and the Court of Appeals' December 2002 ruling. The District Court relied upon unrebutted record evidence demonstrating that Pertamina maintains actual and continuous possession of the Refinery Funds and that it is legally free to spend those funds for any purpose authorized by its budget (including paying the arbitration award). The District Court further found that because the Indonesian laws urged on it by the Government and Pertamina did not contain any language suggesting that the funds were owned by the Government, the evidence of Pertamina's complete possession and control of the Refinery Funds mandated a finding that Pertamina owned them.

The Court of Appeals summarily affirmed the District Court's order. Like the District Court, the Court of Appeals found that because Pertamina and the Government failed to identify any "Indonesian legal directive that deems the refinery funds Indonesia's," the compelling evidence of Pertamina's exclusive possession and control of the Refinery Funds left the presumption of Pertamina's ownership of those funds unrebutted. *See Karaha Bodas Co. v. Pertamina*, No. 04-6551, 2006 WL 565694, at *1 (2d Cir. Mar. 9, 2006) ("*Karaha Bodas II*").

Pertamina's Refusal to Pay

There is no question that Pertamina owes KBC the money at issue in this case: the arbitral panel ordered payment, the U.S. District Court for the Southern District of Texas confirmed that award and entered judgment upon it in December 2001, the U.S. Court of Appeals for the Fifth Circuit affirmed that judgment, and this Court denied *certiorari*. For more than four years, Pertamina has been a recalcitrant judgment debtor, repeatedly attempting to prolong and complicate these proceedings.

The District Court admonished Pertamina and the Government to stop wasting the court's time with their misconduct. The court aptly observed that these proceedings were "a complete waste of litigation," Tr. of Proceedings before S.D.N.Y., May 7, 2004 ("May 7 Tr."), at 2:14-16 (Resp't App. 25a), and noted the impropriety of Pertamina's and the Government's arguments:

> I think the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this useless litigation will keep going. But I want to warn you, I will not put up with further obfuscation of the issues. I will not put up with it, and there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.

Id. at 6:23-7:4. (Resp't App. 25a).

Repeatedly, the District Court criticized Pertamina and the Government for complicating the issues unnecessarily. For instance, at its October 5, 2004 hearing, after Pertamina

informed the District Court that it was refusing to honor a previous promise to pay the Texas Judgment as soon as this Court denied *certiorari* with respect to the Fifth Circuit's affirmance of it, the District Court warned Petitioners:

> Now, you have a choice and your client has a choice, and the republic has a choice, because the republic undoubtedly has a voice in this, to say the least. I warned you, on the record, and I repeated it, from a certain point — and I'll go over the record — Pertamina will be paying the legal fees of KBC. There is no reason for this complex litigation. There is none at all.

Tr. of Proceedings before the S.D.N.Y., Oct. 5, 2004 ("Oct. 5 Tr."), at 3:22-4:3 (Resp't App. 27a); *see also* Apr. 19, 2004 ltr. from M. Slater to the Hon T.P. Griesa, at 2 (Resp't App. 29a) ("Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful."); Oct. 5 Tr., at 2:23-25 (Resp't App. 26a) ("Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter. . ."). At the District Court's invitation, KBC has filed a motion for sanctions as a result of this and other misconduct. The District Court will hear that motion on August 25, 2006.

Several other courts, both U.S. and foreign, have criticized Petitioners' litigation tactics in this case. For example, the Fifth Circuit concluded that Pertamina's litigation conduct was "dubious and somewhat deceptive" and likely undertaken "in bad faith." *Karaha Bodas Co. v. Pertamina*, 335 F.3d 357, 369 n.50, 372 (5th Cir. 2003). The

Fifth Circuit again noted its disapproval of Pertamina's conduct when it affirmed the Texas Judgment, stating that:

> We reject Pertamina's efforts to delay or avoid enforcement of the Award as **evidencing a disregard for the international commercial arbitration procedures it agreed to follow** ... We note that the length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.

Karaha Bodas Co. v. Pertamina, 364 F.3d 274, 282 & n.5 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004) (emphasis added); *see also* Tr. of Proceedings before S.D. Tex., Apr. 2, 2002, at 15:8-13; 32:11-23; 42:7-9 (Resp't App. 31a-32a) (stating that the court was "furious" at Pertamina's conduct); Decision, No. HCCT28/2002, High Court of Hong Kong, (Mar. 27, 2003), at 14:H-J (Resp't App. 36a) (characterizing Pertamina's arguments in a related action to enforce the judgment as "forlorn"); Tr. of Oral Exam. of George Chan, at 78:8-79:4 (Resp't App. 38a) (High Court of Hong Kong issuing a criminal warning to an employee of one of Pertamina's subsidiaries after the court learned of "blatant" disobedience of its garnishment orders).

In sum, Petitioners have a long history of attempting to avoid payment by obfuscating the issues, and their efforts to identify a relevant circuit split are just the latest of their dilatory strategies.

REASONS FOR DENYING THE PETITION

I. The Second Circuit And The District Court Properly Considered And Determined The Indonesian Law Issues Before Them

In their respective Petitions, Pertamina and the Government each argue that the courts below accorded insufficient deference to the Government's proffered interpretation of its domestic laws. Petitioners couch their respective attacks on the Court of Appeals' decision in terms of the need for "international comity," "deference," and "respect." To be sure, those concerns are firmly embedded in American law. They are not, however, implicated by this case. An examination of the decisions below shows that both the District Court and the Court of Appeals carefully considered both the Indonesian laws and the Government's proffered interpretations of those laws in performing their respective analyses, but ultimately rejected the Government's interpretations as being inconsistent with the text of the Indonesian laws themselves.

A. The District Court And The Court Of Appeals Properly Considered The Indonesian Laws Cited By The Government In Determining The Ownership Of The Refinery Funds

Both the District Court and the Court of Appeals conducted painstaking examinations of each of the Indonesian laws relied upon by Pertamina and the Government, and the decisions concerning the Refinery Funds issue were predicated on those courts' findings that none of the laws purportedly governing the Refinery Funds contained any provision establishing governmental

ownership. *See Karaha Bodas*, 2006 WL 565694; *Karaha Bodas Co. v. Pertamina*, No. M-18-302, 2004 WL 2712556 (S.D.N.Y. Nov. 24, 2004). Indeed, the record reflects that the District Court reached its decision only after considering a voluminous evidentiary record that included 27 declarations submitted by Pertamina and the Government concerning the Indonesian legal regime (including six declarations from its legal expert, Sudargo Gautama, an Indonesian law professor who served as Pertamina's lead counsel in some of the proceedings in this dispute), the in-court testimony of Tahria Syafrudin (an Indonesian government official called by the Government to explain the Indonesian laws relied upon by Petitioners), the deposition testimony of Bambang Wiranto (a former Pertamina official who was designated as Pertamina's Rule 30(b)(6) witness to testify about the Indonesian legal regime), and the in-court testimony of Robert Hornick (KBC's expert witness concerning Indonesian law). Thus, Pertamina's suggestion that the courts below "completely ignored" the Indonesian laws cited by Petitioners in support of their argument is forcefully belied by the record.

Furthermore, the record demonstrates that the decisions below were manifestly correct. As KBC noted during the proceedings below, Indonesia clearly knows how to adopt laws vesting ownership of Pertamina's revenues in the Indonesian government: Regulation 41 (which the District Court and the Court of Appeals relied upon in finding that the Government owned the majority of the LNG Revenues) contained express language creating a "Government Share" of those revenues. The laws cited by Petitioners in support of their arguments on the Refinery Funds, in contrast, did not contain any such language. The lack of such language, combined with the unrefuted record evidence that Pertamina

alone possesses, controls, spends, and accounts for the Refinery Funds as its own, confirms the correctness of the decisions below finding Pertamina to be the sole owner of the Refinery Funds.[1]

B. When A Foreign State That Is A Litigant Profers A Self-Interested Interpretation Of Its Law To Suit Its Ends In The Litigation, A Federal Court Is Free To Evaluate The Legal Claim For Itself

Rule 44.1 of the Federal Rules of Civil Procedure provides, in pertinent part, that "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.

Federal courts have ruled consistently that the text of Rule 44.1 vests district courts with broad authority to

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1. Equally unavailing is the Government's argument that the Court of Appeals erred in failing to "conduct[] an independent examination of the principles underlying the concepts of Bezitter and Eigendomsrecht," Min. Pet., at 27. KBC does not dispute the existence of these legal concepts, but notes instead that, as presented by Indonesia's expert, they add nothing to the Indonesian law ownership analysis. Dr. Gautama, the Government's legal expert, himself noted that a party's status as a "bezitter" can be rebutted by evidence that that party has unrestricted use of the property at issue. Here, the District Court and Court of Appeals each found that Pertamina's exclusive use of the Refinery Funds compelled a conclusion that it owned those funds outright. In sum, while neither of the courts below used the terms "bezitter" or "eigendomsrecht" in their analysis, it is clear that their analyses addressed those concepts and supported a conclusion that they were inapplicable.

determine foreign law. *See Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) ("[Rule 44.1] provides courts with broad authority to conduct their own independent research to determine foreign law. . . .") (quoting *Bel-Ray Co., Inc. v. Chemrite*, 181 F.3d 435, 440 (3d Cir. 1999); *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) ("We urge district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations."); *In re Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997) ("The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.") (quoting Rule 44.1 advisory committee's notes), *aff'd*, 161 F.3d 314 (5th Cir. 1998)). Indeed, "federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir.), *cert. denied*, 531 U.S. 917 (2000) (quoting *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1285 (S.D.N.Y. 1980)).

Furthermore, while several courts – including the Court of Appeals in this case – have held that a foreign sovereign's interpretation of its domestic law is entitled to deference, those courts have also noted that the deference owed a foreign state's interpretation is not unlimited. *See, e.g., Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 192 (E.D.N.Y. 2003) ("although we begin with a presumption that the High Arbitrazh Court's December 18, 2001 decision constitutes probative evidence of matters of Soviet law addressed therein, [the] court is not under any absolute obligation to follow the lead of the Russian courts in construing Soviet

law") (citing *Karaha Bodas I*, 313 F.3d at 92) ("[A] foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference.").[2]

It necessarily follows, therefore, that lower courts are free to reject the interpretation of a foreign sovereign, particularly where that sovereign has a stake in the outcome of the litigation.

In sum, the Petitions essentially ask this Court to measure the appropriateness of a lower court's treatment of foreign law through an outcome-based analysis: the only degree of "deference" that would satisfy Petitioners in this case is a ruling holding that the Indonesian laws at issue bar KBC's enforcement claims. But Rule 44.1 expressly vests courts – not self-interested sovereign litigants – with the authority to determine issues of foreign law. The clear text of Rule 44.1 and the consistency with which it has been interpreted leaves no need for this Court to adopt a new rule giving a sovereign's interpretation of its own laws conclusive effect.

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2. In the circumstances presented here, the Government is not entitled to any deference as a matter of international comity. The Third Circuit has stated that "comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises. It also encourages the rule of law, which is especially important because as trade expands across international borders, the necessity for cooperation among nations increases as well." *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). Indonesia and its wholly-owned and controlled state company have resolutely refused to pay the award, in defiance of the rule of law. To allow the Government to obtain the protection of comity would impermissibly allow it to "reap the benefits of our courts while avoiding the obligations of international law." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 632-34 (1983).

C. The Court Of Appeals Did Not Presume Any Similarity Between U.S. And Indonesian Law In Deciding Ownership Of The Refinery Funds

The Government points to a single sentence of the Court of Appeals' decision in *Karaha Bodas II* as evidence that the Court of Appeals failed to "analy[ze] Indonesian law on its own terms." Min. Pet., at 24. Specifically, the Government claims that the Court of Appeals' statement that under the BBM regime "Indonesia acts like a guarantor" draws an improper analogy to U.S. law.

Contrary to the Government's suggestion, the concept of a guarantor is not limited to U.S. law. As Government's own legal expert, Sudargo Gautama, has acknowledged, the Indonesian Civil Code also expressly permits the formation of guarantee relationships. *See* Sudargo Gautama, *Essays In Indonesian Law* 298-99 (1991) ("Personal guarantee for the debts of another person is regulated in Articles 1820 et seq. of the Civil Code."); Sudargo Gautama, Indonesia, 3 *Legal Aspects Of Doing Business In Asia And The Pacific* 193, 211 (1984) ("A guarantor has the same obligation as the debtor"); *see also* William A. Sullivan, *Indonesia*, INS 75-522 (CCH Asia Limited 2004) ("Personal guarantees are well known in Indonesia").

Because Indonesian law recognizes concepts of guarantee, there is nothing to support the Government's contention that the Court of Appeals "presume[ed] that the rights and obligations under U.S. law . . . are analogous to Indonesia's rights and obligations . . . vis-à-vis the Refinery Revenues." Rather, the Court of Appeals could very well have been referring to Indonesian guarantee principles. In all events, the Court of Appeals' statement was clearly intended

to be illustrative, and the Government's suggestion that the Court of Appeals' inclusion of this single sentence somehow led to the wrong result is difficult to credit.

D. Pertamina Lacks Standing To Challenge The Court Of Appeals' Conclusions Concerning Indonesian Law

Pertamina lacks standing to seek *certiorari* of the Court of Appeals' decisions insofar as those decisions relate to the Refinery Funds. A party lacks standing under Article III of the Constitution to bring an action in federal court, including a review of an earlier decision, unless the party has suffered "injury in fact." *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The lower court decisions holding that Pertamina is the lawful owner of the Refinery Funds did not themselves cause Pertamina injury. As such, Pertamina has no standing to appeal the decisions on the ownership of the Refinery Revenues.

Moreover, to the extent Pertamina attempts to justify its petition by pointing to purported harm suffered by the Government of Indonesia, Pertamina lacks standing to bring such a claim as well. *See, e.g.*, PT Pet., at 14 ("the Second Circuit deprived the Government of Refinery Revenues"). "[G]enerally [a party] must assert his own legal rights and interests, and cannot rest his claim for relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). A party is only permitted to assert the rights of a third party where it can make two additional showings: (1) a close relationship with the person who possesses the right; and (2) the existence of a hindrance to the other party's

ability to protect his own interests. *Kowalski*, 543 U.S. at 130 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (holding attorneys did not have standing to assert rights of inmates denied counsel on appeal)).

Any suggestion that the Government has been "hindered" in protecting its interests in this case is simply not credible: the Government has been fully engaged in the New York proceedings since their commencement, and has submitted both briefing and evidence in connection with every issue considered by the District Court and the Court of Appeals. For this reason alone, Pertamina's petition should be denied.

II. There Is No Conflict Between The Circuits Concerning Federal Courts' Application Of Rule 69 In Execution Proceedings Against Foreign States

In *Karaha Bodas I*, the Court of Appeals employed a two-step procedure in choosing the appropriate law. First, pursuant to the express mandate of Rule 69, the Court looked to New York law to determine the **types** of property that are subject to execution, that is, to determine "what assets are 'subject to enforcement, and thus available to judgment creditors.'" *Karaha Bodas I*, 313 F.3d at 83 (quoting *Alliance Bond Fund Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999)). The Court of Appeals concluded that New York law permitted KBC to execute upon any property that Pertamina could "assign or transfer." *Id.* (citing N.Y. C.P.L.R. § 5201(b)). In the second step, the Court of Appeals resolved the issue of who actually owned the property that was subject to execution. In making this second determination, the Court of Appeals had, as an initial matter, to decide which choice-of-law rules to use to select the law that would govern the second issue. The Court of Appeals

rejected the Government's request that it apply federal common law choice-of-law rules to this second step; it instead applied the choice-of-law rules of the forum, New York, which require an interest analysis. As a result of this interest analysis, the Court of Appeals determined that Indonesian law, rather than New York law, governed the issue of who owned the property. Applying Indonesian law, the Court of Appeals found that the Government owned all of the LNG Funds, except the Retention Fee; as to the Retention Fee, the Court of Appeals found that Pertamina owned an executable future interest which was executable under New York law. Applying the same principles, the Court of Appeals found in *Karaha Bodas II* that Pertamina owned the Refinery Revenues.

The Government now claims that the circuits disagree about "whether the FSIA requires a federal court to apply a federal common law choice-of-law rule or the forum state's rules." Min. Pet., at 9.

> If the Court of Appeals had applied a federal common law choice of law rule, it would have also applied federal common law instead of New York law as the substantive rule of decision, as did the *Bancec* court. In doing so, the Court of Appeals would not have held that any part of the restrained funds was subject to execution as Pertamina's 'future interest' in the Retention Fee. . . .

Min. Pet., at 21.

Thus, the Government is now arguing that federal common law choice-of-law rules should have been applied to **both** steps of the Court of Appeals' analysis. That is, it now contends that federal common law choice-of-law (and through it federal substantive common law) should displace at the first step the

normal Rule 69 requirement that a court apply forum law in order to determine what types of property may be attached. The Government also contends that federal choice-of-law principles should displace the forum's choice-of-law principles at the second step, the determination of the respective property rights in the attached property.

The Government's characterization of the Court of Appeals' decision is inaccurate and misleading. A proper analysis of the record demonstrates irrefutably that there is no basis for granting the petition.

First, there is no conflict between the circuits concerning the use of Rule 69 in the first step of attachment proceedings against foreign states. None of the Ninth Circuit cases relied upon by the Government involved Rule 69 in execution proceedings against foreign states. *See Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561 (9th Cir. 1992) (determining applicable choice-of-law rule to use in considering applicability of illegality defense); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) (determining applicable choice-of-law rule to use in considering wrongful death liability); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (determining what choice-of-law rule controls application of respondent superior principles). Indeed, Rule 69 can properly be viewed as a mandatory choice-of-law for the first step of attachment proceedings, and it is mandatory even with respect to foreign states because nothing in the FSIA displaces it.[3]

---

3. The Advisory Committee Note accompanying Rule 69 contains a list of federal statutes governing execution or garnishment of property that the Advisory Committee considered to displace Rule 69. This list makes no mention of the FSIA. *See* Fed. R. Civ. P. 69 advisory committee's note.

The lack of any conflict of authority concerning the use of Rule 69 in cases such as this is apparent from the fact that federal courts have uniformly relied upon Rule 69 – and the state law attachment principles it incorporates – in attachment proceedings involving foreign sovereigns. *See, e.g., Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005) (applying state law as directed by Rule 69 despite argument that the FSIA should control all issues in which it is implicated); *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1285 (11th Cir. 1999) (finding that Rule 69(a) required the application of state law to determine the propriety of a garnishment against a foreign instrumentality); *Flatow v. Alavi Found.*, No. 99-2409, 2000 WL 1012956, at *1 (4th Cir. July 24, 2000) (noting, in a case involving the FSIA, "that Rule 69 of the Federal rules of Civil Procedure dictates that state law and procedures control proceedings on writs of attachment in aid of execution"). Because federal decisional law is uniform concerning the application of Rule 69 and forum law to execution proceedings against foreign states, there is simply no conflict justifying this Court's intervention here.

Second, there is no difference between the federal common law choice-of-law rules and the New York choice-of-law rules. The Government conceded below that the federal common law choice-of-law rule it proposed would mandate an "identical inquiry" as that required by the New York choice-of-law rule. Brief of Non-Party Appellant at 42, *Karaha Bodas I*, 313 F.3d 70 (2d Cir. 2002) (No. 02-7513). As the Government then conceded, "[b]ecause federal common law choice-of-law rules and the choice-of-law rules of New York both employ interest-based analysis and both lead to an application of Indonesian substantive law, there is no real conflict here as to which choice-of-law rule to use." *Id.*

Third, the Government never argued below that federal choice-of-law principles should displace Rule 69's requirement that the court look to forum law to determine, at the first step, what types of property could be attached. In fact, as the Court of Appeals noted:

> While the litigants agree that New York law governs what property can be attached, they diverge on what law governs the property rights of the Republic of Indonesia and Pertamina in the disputed funds.

Karaha Bodas I, 313 F.3d at 84. Because the Government did not raise this issue below it cannot raise it now. *See National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); accord *Adarand Constructors v. Mineta*, 534 U.S. 103, 109 (2001).

Fourth, the Government's new contention that the Court of Appeals should not have used New York's "future interest" rule of decision is wholly irrelevant to the Court of Appeals' determination in *Karaha Bodas II* concerning the Refinery Revenues. The dispute concerning Pertamina's "future interest" is simply not applicable to the Refinery Funds, which Pertamina alone possesses and controls from the day it receives them in New York until the day it spends them in Indonesia or elsewhere. The "future interest" dispute is limited to the Retention Fees, which flow through the New York accounts but which are only finally paid to Pertamina in Indonesia. Accordingly, even if this Court were to completely accept the Government's argument to apply federal common law instead of New York's "future interest" rule of decision, the Court of Appeals' decision in *Karaha Bodas II* would be unaffected, and KBC would still be

entitled to turnover of the full amount of the Texas Judgment. It would thus be improvident to grant the Government's petition on this issue.

Fifth, Pertamina and the Government **prevailed** on the ultimate choice-of-law issue. The Court of Appeals found that under the New York choice-of-law analysis, the extent of Pertamina's property interest in the disputed funds was required to be determined under Indonesian law – as Petitioners urged – rather than under New York law, as contended by KBC. *Karaha Bodas I*, 313 F.3d at 84-88. The Court of Appeals then found that, under the Indonesian law principles urged on it by the Government, Pertamina's interest in the LNG Funds was limited to its interest in the Retention Fee, which it further found was property subject to execution under New York law. Similarly, in *Karaha Bodas II* the Court of Appeals looked to Indonesian law in determining that Pertamina owns the Refinery Revenues. Accordingly, as with the "future interest" issue, the District Court and the Court of Appeals applied the substantive law urged on them by Petitioners.

CONCLUSION

For all the foregoing reasons, this case simply does not present a "direct, open conflict in the courts of appeals." The lack of any such conflict, coupled with the Court of Appeals' adoption of the governing law urged on it by Petitioners, illustrates the lack of any need for this Court's intervention. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RULE AND STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
VIII. PROVISIONAL AND FINAL REMEDIES

Amendments received to April 18, 2003

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Appendix A

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

§ 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

Appendix A

(c) Proper garnishee for particular property or debt

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8-112 of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

§ 5222. Restraining notice

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature

or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in

the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the

restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order.

(d) Notice to judgment debtor or obligor. If a notice in the form prescribed in subdivision (e) has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns

a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);

2. Social security;

3. Public assistance (welfare);

4. Alimony or child support;

5. Unemployment benefits;

6. Disability benefits;

7. Workers' compensation benefits;

8. Public or private pensions; and

9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

* * * *

APPENDIX B — RULING

NUMBER: 01/BANDUNG/WASIT.INT/2002
FOR JUSTICE BASED ON ALMIGHTY GOD

THE SUPREME COURT

having heard the appeal of the District Court's ruling regarding an Arbitral Award has handed down the following ruling in the case of:

KARAHA BODAS COMPANY, L.L.C, a corporation established under the laws of the Cayman Islands, domiciled at Jalan T. B. Simatupang, Kav. 10, Jakarta 12310, now with offices c/o Jaya Geothermal, L.L.C. 565 Fifth Avenue, 29th Floor, New York 10017, in this matter represented by their attorneys: RAMBUN TJAJO, JD, SARAH NATALIA, JD, and PERRY CORNELIUS, JD, Attorneys and Lawyers, with offices in the Graha Niaga, 2nd Floor, Jalan Jenderal Sudirman, Kaveling 58, Jakarta 12190, the Appellant, the former Defendant;

versus

THE STATE OIL AND GAS COMPANY (PERTAMINA), with offices at Jalan Perwira No. 2, Jakarta 10110, in this matter represented by their attorneys: 1. Prof. Dr. S. Gautama, Esq., 2. Dr. T. Tuegeh Longdong, JD, LLD, 3. Liz Asnahwati, JD, and 4. Tety Irawati, JD, Attorneys and Lawyers with offices at Jalan Medan Merdeka Timur, No. 9, Jakarta 10013, the Appellee, formerly the Plaintiff;

Appendix B

and

PT. PLN (Incorporated), domiciled at Jalan Trunojoyo, Kebayoran Baru, South Jakarta 12160, in this matter represented by their attorneys: 1. Derina, JD., 2. Rex R. Panambunan, JD., and 3. Bobby Hadi Pumomo, JD., all employees of PT. PLN (Incorporated), with offices at Jl. Trunojoyo, Block M I/135, Kebayoran Baru, South Jakarta, the Co-Appellee, formerly the Co-Defendant;

The Supreme Court;

Having read the relevant documents;

* * *

filed by the Arbiter or his attorney;

To consider, that the opinion of the Supreme Court on the above-mentioned reasons:

regarding the objections to 3 and 4:

that these objections can be upheld because the lower-court judge misinterpreted the law in the following considerations:

a. that the Plaintiff's suit was basically a suit to set aside the Arbitral Award reached in Geneva, Switzerland on December 18, 2002 (Final Award in an Arbitration Procedure under the UNCITRAL Arbitration Rules), Exhibit P-1);

b. that under Article 1 Point 9 of the Law No. 30 of 1999, the ruling handed down by an arbitration institution or an individual arbiter outside the jurisdiction of the Republic of Indonesia, as in the arbitration decision whose setting aside was petitioned for by the Plaintiff (Exhibit P-1), is the International Arbitral Award;

c. that Law No. 30 of 1999 only governs International Arbitration in Article 65 through Article 69, which besides governing the conditions for recognizing and enforcing a International Arbitral Award in Indonesia, also governs the procedures for petitioning for said Arbitral Award;

d. that Article V Paragraph (1) of the New York Convention of 1958 (Convention on the Recognition and Enforcement of International Arbitral Awards) which was ratified and declared in force by Presidential Decree No. 38 of 1981 reads:

> "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if. . . . etc.;

e. "The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

that furthermore Exhibit T.5 shows that the Plaintiff's and the co-Defendant's attorney has filed an appeal against the

Arbitral Award under dispute (Exhibit P-1) with the Swiss Supreme Court under the International Civil Law of Switzerland;

f. that therefore the Central Jakarta District Court does not have the authority to hear and rule on the suit to set aside the International Arbitral Award filed by the Plaintiff;

Considering that based on the above considerations, and without the need to take into consideration the other objections, in the opinion of the Supreme Court there are sufficient reasons to grant the appeal of the Appellant KARAHA BODAS, LLC and to set aside the Central Jakarta District Court ruling dated August 27, 2003 No. 86/PDT.G/ 2002/PN.JKT.PST, and the Supreme Court will render its own decision on this case with such disposition as to be stated below;

Considering that therefore the Appellee is the losing party, it will be ordered to pay court costs at both levels of justice;

Noting the Articles of Law No. 30 of 1999, Law No. 14 of 1985 as amended by Law No. 5 of 2004 as well as other Articles of the relevant laws;

TO RENDER A DECISION TO

grant the appeal of the Appellant KARAHA BODAS, L.L.C.;

set aside the Central Jakarta District Court ruling dated August 27, 2002 No.86/PDT.G/2002/PN.JKT.PST;

TO RENDER ITS OWN DECISION

To the Objections

to uphold the Defendant's objections;

To the Application for Interim Relief and in the Substance of the Case

to declare that the Central Jakarta District Court did not have the authority to hear and adjudicate the Plaintiff's suit;

to order the Appellee/Plaintiff to pay court costs at the two levels of justice, which at the appeals level is set at Rp. 500,000 (five hundred thousand rupiah);

In witness thereof the ruling was handed down at the deliberative session of the Supreme Court Council on Monday, March 8, 2004 by Bagir Manan, chief justice of the Supreme Court, as the chairman of the session, Prof. Dr. Paulus E. Lotulung, JD and Marianna Sutadi, JD, as associate members, and pronounced in open court on the same day by the chairman of the session in the presence of Prof. Dr. Paulus E. Lotulung, JD and Marianna Sutadi, JD, associate members, Shirley P. Widodo, JD, substitute clerk in the absence of the two parties.

Appendix B

Associate Members
signed
Prof. Dr. Paulus E. Lotulung, JD
signed
Marianna Sutadi, JD

Chairman
signed
Bagir Manan

Costs:

1. Stamps	Rp	6,000
2. Recording	Rp.	1,000
3. Cassation Administration	Rp.	493,000
Total	Rp.	500,000

Substitute Clerk
signed
Shirley P. Widodo, JD

For the copy
REPUBLIC OF INDONESIA SUPREME CQURT
DIRECTOR OF CIVIL MATTERS
/signature/
ANDAR PURBA, JD
Civil Service ID No. 040015551

/seal/
SUPREME COURT

APPENDIX C — WRIT OF EXECUTION AND ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M-18-302

In the Matter Of An Arbitration

Between Karaha Bodas Company, L.L.C.,

Petitioner,

v.

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),

Respondent.

WRIT OF EXECUTION AND
ORDER TO SHOW CAUSE

Upon consideration of the application of Karaha Bodas Company, L.L.C. ("KBC") for a writ of execution, the declaration of Christopher F. Dugan, dated February 22, 2002 and the exhibits annexed thereto, and the accompanying memorandum of law, and sufficient cause appearing therefore; and

Upon consideration of the final judgment (the "Judgment") entered in an action (the "Texas Action") in the United States District Court for the Southern District of Texas

between petitioner KBC and respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") on December 4, 2001, confirming the final arbitral award entered in *Karaha Bodas Company v. Pertamina & Oth*ers. YD/IS 60 319 and awarding KBC $261,166,654.92, plus interest from January 1, 2001; and

Upon consideration of the Order entered by the court in the Texas Action on January 25, 2002 (the "Texas Order") finding that a reasonable time has passed to satisfy the requirements of § 1610(c) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1610(c), and authorizing KBC to commence execution of the Judgment; and

Upon consideration of the *ex parte* Writ of Garnishment issued February 11, 2002 by the court in the Texas Action against Pertamina's assets in Texas; and

Upon consideration of the Certification of Judgment for Registration in Another District, entered by the court in the Texas Action on February 21, 2002 and filed with this Court on February 22, 2002; and

It appearing that Rule 69 of the Federal Rules of Civil Procedure, the FSIA and the Texas Order require a court-ordered Writ of Execution authorizing KBC to execute upon any property of Pertamina within this jurisdiction; and

It appearing that there exist within this jurisdiction certain monies, securities or other assets (the "Funds") in accounts held by or for the benefit of Pertamina (the

"Accounts") and maintained by the banks listed on Exhibit A annexed hereto (the "Banks"); and

It appearing that, pursuant to the FSIA and the Texas Order, a court order authorizing KBC to issue restraining notices upon the Banks pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules ("CPLR") applicable thereunder is required; now, therefore

IT IS HEREBY ORDERED, that a Writ of Execution is hereby issued; pursuant to this Writ of Execution, Rule 69(a) of the Federal Rules of Civil Procedure and the FSIA, 28 U.S.C. § 1610(c), KBC is authorized to execute upon any property of Pertamina within this jurisdiction in satisfaction of the outstanding final judgment, amounting, to date in total to the sum of $261,166,654.92 plus interest from January 1, 2001 until full payment; and

IT IS FURTHER ORDERED, that (1) pursuant to the Writ of Execution, Rule 69(a) of the Federal Rules of Civil Procedure and CPLR § 5222, KBC shall be permitted to serve upon the Banks restraining notices in form substantially similar to the attached Exhibit B; and (2) that each such restraining notice shall be issued either by this Court or by the Clerk of Court; and

IT IS FURTHER ORDERED, that pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of the CPLR, KBC shall promptly serve Pertamina and the Banks with a copy of this order to show cause and the restraining notices, together with papers submitted in support thereof,

and that such service shall be deemed good and sufficient service (1) if made by hand upon counsel for Pertamina, Cleary, Gottlieb, Steen and Hamilton, 1 Liberty Plaza, New York, New York 10006, on or before 5:00 p.m. on February 25, 2002, with a copy by certified mail to Pertamina at 1360 Post Oak Blvd., Suite 1590, Houston, Texas 77056, and (2) if made by hand upon the Banks on or before 5:00 p.m. on February 25, 2002, such service to be made by any person who is over 18 years of age and not a party to this action; and

IT IS FURTHER ORDERED, that Pertamina show cause before the Honorable Thomas P. Griesa, United States District Judge, Courtroom 26B, United States Courthouse, 500 Pearl Street, New York, New York, on the 18th day of March, 2002, at 10:00 a.m., or as soon thereafter as counsel may be heard, why an order of execution pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and CPLR § 5230 shall not issue to the Sheriff of New York County or the United States Marshal directing him to satisfy the Judgment out of the Funds held by or for the benefit of Pertamina in the Accounts maintained by the Banks; and

IT IS FURTHER ORDERED, that objections or responses, if any, to the relief requested herein shall be filed with the Court and served in a manner so as to be received by (1) counsel for KBC, Jones, Day, Reavis & Pogue, 599 Lexington Avenue, New York, New York 10022, attention: Steven C. Bennett, on or before 5:00 p.m. on March 12, 2002, and (2) the Banks, on or before 5:00 p.m. on March 12, 2002; and

Appendix C

IT IS FURTHER ORDERED, that KBC make take any and all discovery of the Banks as provided under Rule 26 of the Federal Rules of Civil Procedure, and that all responses to any such discovery requests shall be served in a manner so as to be received by counsel for KBC, Jones, Day, Reavis & Pogue, 599 Lexington Avenue, New York, New York 10022, attention: Steven C. Bennett, no later than five (5) days prior to the hearing.

Dated: New York, New York
February 22, 2002

s/ Thomas P. Griesa
UNITED STATES DISTRICT JUDGE

Appendix C

EXHIBIT A

Bank Indonesia
165 Broadway, 31st Floor
1 Liberty Plaza
New York, New York 10006

Bank of Montreal Trust Company
c/o Harris Trust Company of New York
88 Pine Street
New York, New York 10005

Bank of Nova Scotia Trust Company of New York
One Liberty Plaza, 23rd Floor
New York, New York 10006

Bank of Taiwan New York Agency
The Crown Building Center
730 Fifth Avenue, 9th Floor, Suite 907
New York, New York 10019

Bank Rakyat Indonesia
430 Park Avenue, 2nd Floor
New York, New York 10022-3505

PT Bank Central Asia (Persero)
641 Lexington Avenue
New York, New York 10022

Appendix C

PT Bank Negara Indonesia (Persero) Tbk
55 Broadway
1 Exchange Plaza, 5th Floor
New York, New York 10006-3002

PT Bank Mandiri (Persoro)
100 Wall Street, 18th Floor
New York, New York 10005-3702

APPENDIX D — EXCERPTS OF TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUM NEGARA (PERTAMINA),

Respondent.

May 7, 2004
5:10 p.m.

[2] (In chambers; phone conference)

THE COURT: I wanted to talk to you about our schedule. I suppose this is a waste of time, but there is a great deal of useless litigation going on, and I have gotten a start on one motion, which has voluminous papers. It's the motion of KBC about the year 2003, wanting a turnover, a declaration with respect to the 2003 period of time up to November.

Now, that has a voluminous record all itself. Then there is a litigation about the unadjudicated accounts. And you're worried about the schedule. And I don't want to really be

harsh about the schedule. Mr. Slater has asked for some time, and I would certainly like to accommodate that. But all this, of course, is created by the fact that there still is not firm security for this judgment. To me, that is a complete waste of litigation.

* * *

THE COURT: I think the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this useless litigation will keep going. But I want to warn you, I will not put up with further obfuscation of the issues. I will not put up with it, and there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.

* * * *

APPENDIX E — EXCERPTS OF TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS CO., L.L.C.,

Plaintiff,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (Pertamina),

Defendant.

October 5, 2004
10:10 a.m.

[2] * * *

MR. SLATER: Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter that —

* * *

THE COURT: There is a lawful judgment which is final. There is an indebtedness. It is open and shut. And there was a commitment.

Appendix E

Now, you have a choice and your client has a choice, and the republic has a choice, because the republic undoubtedly has a voice in this, to say the least. I warned you, on the record, and I repeated it, from a certain point — and I'll go over the record — Pertamina will be paying the legal fees of KBC. There is none at all.

* * * *

APPENDIX F — LETTER FROM MATTHEW D. SLATER TO THE HONORABLE THOMAS P. GRIESA DATED APRIL 19, 2004

CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, W.C. 20006-1801
(202) 974-1500

April 19, 2004

VIA FACSIMILE

Hon. Thomas P. Griesa
United States District Court for
the Southern District of New York
500 Pearl Street, Courtroom 26B
New York, New York 10007

Re: *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*. No. 21-MC-00098

Dear Judge Griesa:

I am writing to report on developments relating to the matters discussed during the telephone status conference conducted on April 12, in particular in relation to the Court's request that Pertamina confirm its readiness to pay the judgment in this case.

As I have previously stated in open court, it is Pertamina's policy to observe its legal obligations and international

commitments. Its preferred method of dispute resolution is amicable agreement, and it continues to seek a negotiated settlement in this case. Although it believes that the arbitration award is deeply and fundamentally flawed (and an Indonesian court has so held) and that all or most of the funds in the restrained accounts belong to the Ministry, it is mindful that the courts in the United States and Hong Kong thus far have concluded that the award may be enforced, and Pertamina has given careful consideration to this Court's questions about Pertamina's intentions as to payment.

I am pleased to report, therefore, that I am now authorized by Pertamina to advise the Court that Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful. In return, Pertamina expects that KBC will agree to suspend proceedings concerning the arbitration award in other jurisdictions and, upon payment, that KBC would dismiss all such proceedings with prejudice. Pertamina's commitment is without prejudice to its firm position as to the flaws in the arbitration award and as to ownership of the restrained funds, but rather is undertaken to bring this dispute to a conclusion upon a final and unreviewable determination that the arbitration award is enforceable in the United States.

Based on Pertamina's commitment to pay the judgment without regard to ownership of the funds subject to restraint, the litigation before this Court can be suspended, and there is no need for the Rule 30(b)(6) deposition, as both the Court and KBC acknowledged during the April 12 conference.

Accordingly, we respectfully request that the Court vacate or stay its discovery order entered April 15, 2004.

Respectfully,
s/Matthew D. Slater
Matthew D. Slater

cc: Christopher F. Dugan
Carolyn B. Lamm

APPENDIX G — EXCERPTS OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

01-CV-634

KARAHA BODAS COMPANY LLC

plaintiff

v

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA

defendant

April 2, 2002
Houston, Texas
12:30 p.m.

PROCEEDINGS

* * *

And that issue was raised. In order for Pertamina in those sorts of circumstances to give greater authority to their counsel, they have to go to the highest reaches of the company.

THE COURT: You know, it's so sad.

Appendix G

MR. SLATER: Sorry?

* * *

First of all, there is no question in my mind that Pertamina, at least on this record, based on Mr. Slater's affidavit, there is no question in my mind that Pertamina had notice of my order to withdraw its injunctive relief request, and there is no question in my mind that they chose for their own reasons, maybe logistical, maybe intentional, not to comply with that request.

There is no question that the Court order was in effect from the moment I issued it onward, so I do find that Pertamina is in contempt, civil contempt, under the standards that have been adopted by the Fifth Circuit in American Airlines, Inc. versus Allied Pilots Association, 228 F3d. 574 at 581. And that is the year 2000.

* * *

THE COURT: I'm furious, Counsel. I'm furious. But I have issued what I think to be a temperate response. Don't test me.

* * * *

APPENDIX H — DECISION OF THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE DATED MARCH 27, 2003

IN HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 28 OF 2002

KARAHA BODAS COMPANY LLC

Plaintiff

and

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA)

Defendant

DECISION

* * *

Appendix H

(b) As a matter of law

17 If, contrary to KBC's primary submission that determination of the *lex arbitri* is a question of fact, it is necessary to construe the arbitration clauses in the contracts to determine the *lex arbitri,* then this court places reliance on the following matters, in coming to the conclusion that the answer remains, Swiss law

18 From the wealth of authority cited by both counsel on this issue can be gleaned the following starting point "The curial law *(lex arbitri)* is normally but not necessarily the law of the place where the arbitration proceedings are held" (*per* Hobhouse J in *Dallal v Bank Mellat* [1980] at p 252 "The place" plainly refers to the legal seat of the arbitration (here Geneva) not a random city of convenience for the arbitrators (here Paris) For the normal situation not to apply there must be strong pointers to the contrary Such pointers as there may be in this case cannot, in my view, be regarded as strong when put in context and balanced against the following factors

(1) Had the parties wanted to, expressly, depart from the norm they could have said so in the contracts but they did not The contracts are specific as to the substantive law (Indonesian) but silent as to the lex arbitri Lord Mustill in *Channel Group v Balfour Beatty Ltd [1993]* AC at p 357 said

> Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the

> arbitration is to be held but in the absence of an explict choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible

Clearly, Pertamina and KBC did not make an "explicit choice" There are many other authorities in support of this general proposition, one being Potter J in *Sumitono v Oil & Natural Gas Commission* [1994] 1 LIoyd's Reports, at p 57

> There is it is true no express choice of curial law However, there is a clear requirement that the arbitration proceedings be held in London In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the seat' of the arbitration, ie the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings —"

It is acknowledged that the presumption may be rebutted by matters other than an express provision

to the contrary, however, it seems to me that in the present case Pertamina's attempt to do so is forlorn

(2) The drafters of the contracts were explicit on many matters such as the choice of a neutral place (Geneva), the adoption of the UNCITRAL rules in the arbitration and the choice of Indonesian law as the law of the contracts It is not a difficult inference to draw that had Pertamina insisted on an express provision stating that the *lex arbitri* was to be Indonesian law the contracts would not have been signed I find It irresistible that the choice of Geneva as the "place" was also a choice that it was the formal "seat" in the legal sense By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place

(3) The UNCITRAL rules require that an award is made at the place (or seat) of the arbitration Accordingly, the preliminary award the award itself and the post-award decision were all expressly stated to be made to Geneva All these were done as a matter of course It was never argued that it should be otherwise

(4) Pertamina, as evidence of "strong pointers" to rebut the presumption rely, *inter alia*, on the fact that the contracts themselves are replete with references to the provisions of Indonesian law" The expression "replete with" somewhat overstates the position but they point out that the contracts expressly provide

for the modification of, in particular, four Articles of the Indonesian Code of Civil Procedure Article 650 2 (appointment of arbitrators) and 620 1 (time limits on arbitrations) have been modified, Article 631 (authority to arbitrators to decide on "amiables compositeurs") has been invoked and Article 641 (rights of appeal) has been waived

In my judgment the existence of these provisions barely dents the fundamental principle in favour of Swiss law Both parties to this application have produced lengthy and learned academic expert opinions on the issue, and both counsel have argued the strengths and weaknesses of the competing opinions I propose to be extremely sparing in my citation of the various opinions because of the overwhelming weight to be attached to the underlying factual truth that the parties' choice of a neutral seat together with the absence of an express choice of different *lex arbitri* are the dominant factors in the equation which, in this case, results in the answer that commercial common sense demands that Indonesian law was not to be the *lex arbitri* I merely select one passage from the opinion of Mr. Robert Hornick, an American lawyer and academic of great experience in this field

* * * *

APPENDIX I — EXCERPTS OF ORAL EXAMINATION OF GEORGE CHAN

MICHAEL PILKINGTON: Good morning, Master.

MASTER WONG: Yes.

MICHAEL PILKINGTON: I appear for the judgment creditor in this matter and its an oral examination of Mr Chan, who is an officer of the Garnishee Pertamina Energy Trading Limited. So, Master, I have some preliminary comments I would like to make to you, Master, in relation to the background of this matter.

MASTER WONG: Yes.

MICHAEL PILKINGTON: And I think perhaps we can deal with before Mr Chan is actually sworn in to give evidence.

MASTER WONG: It appears to be a blatant breach of a Court order. And Mr Pilkington intends to explore the underlying reason.

Miss Lu, on your behalf, has objected to this line of questioning.

My observation is that this sort of line of questioning is fairly pertinent and can be properly asked within the scope of the Order for Oral Examination.

Save and except that the answer may be given by you could amount to a — may amount to a self-incrimination of yourself. In short, if somebody has stolen something from

others, under caution by the police he or she may elect to remain silent.

So even I will be allowing Mr Pilkington to ask you why in that sense you may exercise your right of silence. But certainly you are reminded that you should not lie to this Court. Otherwise you will be in serious trouble.

* * * *

(3)

No. 05-1573

FILED

AUG 16 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

United States Supreme Court

PT PERTAMINA (PERSERO), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

Henry Weisburg
Counsel of Record

Panagiotis Katsambas
SHEARMAN & STERLING LLP
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New York, New York 10022
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Counsel for Petitioner

ated: August 16, 2006

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Petitioner Pertamina PT (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully submits this reply to the brief in opposition ("Opposition") filed by Respondent Karaha Bodas Company, L.L.C. ("Respondent" or "KBC").

I. REPLY TO COUNTER-STATEMENT OF THE CASE

In its Counter-Statement of the Case, KBC presents a misleading picture of the procedural background of the case, the involvement of the Ministry, and the arguments raised by Pertamina in connection with its defense of the enforcement proceedings initiated by KBC.

As a threshold matter, KBC mischaracterizes Pertamina's refusal to pay the arbitral award with "other people's" money as a general refusal to pay. Opposition at 9-11. Pertamina appreciates KBC's right to collect from Pertamina's own funds but has—properly—resisted paying with other funds. In fact, KBC has already collected approximately $55 million from Pertamina's funds in the United States.

Contrary to KBC's suggestion, Pertamina had every right to raise objections to KBC's attempts to execute on property that did not belong to Pertamina. In fact, the District Court repeatedly recognized the propriety of Pertamina's arguments. For example, with respect to the Retention Fee, the District Court noted that it was "not dealing with insignificant issues" and that "Pertamina was raising questions it had a right to raise." *See* March 4, 2005 Hearing Transcript at 4 (Reply App. at 1a).[1] Similarly, with respect

[1] As noted above, KBC failed on its primary argument with respect to the Retention Fee. *See Karaha Bodas Co., L.L.C. v. Pertamina*, 313 F.3d 70 (2d Cir. 2002) (denying KBC's appeal against dis-

to the Refinery Revenues, the Court stated that it accepted "most of what Pertamina and the [Ministry] have presented" on the Refinery Revenues issues, but drew a different legal "conclusion." *See* October 5, 2004 Hearing Transcript at 161-64 (Ministry's Pet. App. 58a-60a).

However, in reaching that legal "conclusion" with respect to the Refinery Revenues, the District Court and the Second Circuit accorded insufficient deference to the Indonesian Government's views of its own significant legal principles.

Moreover, the Ministry's involvement in the proceedings below was entirely appropriate, as would be the case for any party whose property is the subject of enforcement proceedings relating to the payment of the debt of a third party. In fact, both the Second Circuit and the District Court recognized this and excluded from execution a very significant portion of the property that KBC was attempting to restrain and execute against, on the ground that it was property of the Ministry and not the judgment debtor.

As KBC acknowledged (*see* Opposition at 6), the Second Circuit held that "all of the LNG Funds [or funds in the Adjudicated Accounts] except the Retention Fee was owned by Indonesia." Thus, since the Retention Fee was not more than 5% of the amount transferred to the Ministry, the vast majority of the funds in the Adjudicated Accounts that KBC attempted to execute against belonged to the Ministry.[2] Therefore, irrespective of the arguments

---

trict court's decision that KBC could not execute against the entirety of Pertamina's Production Sharing Percentage, part of which was the Retention Fee).

[2] The amounts restrained by Bank of America in the Adjudicated Accounts were approximately $503 million. In June of 2002, the New York Court ordered Bank of America to release $226 million and con-

raised in the Petition, the Ministry's intervention was warranted to protect its property.

II. PERTAMINA HAS STANDING TO BRING THIS PETITION

For the first time, KBC now argues that Pertamina lacks standing to contest the decisions of the District Court and the Second Circuit concerning ownership of the Refinery Revenues. Opposition at 18. This argument fails for several reasons.

First, KBC offers no support for its "lack of standing" argument. Indeed, the only authority that KBC cites, *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), simply stands for the general proposition that, under Article III of the Constitution, a party cannot bring an action in federal court unless that party has suffered "injury in fact." The facts of *Vermont Agency* do not resemble the facts of this case in any way. Further, KBC's conclusory assertion that "[t]he lower court decisions holding that Pertamina is the lawful owner of the Refinery Funds did not cause Pertamina injury" is not supported by any authority. Opposition at 18.

Second, KBC did not raise this argument below and, accordingly, should not be permitted to do so now. It is well settled that the Court will not reach an issue which is not raised, considered, or resolved in the court below but is raised for the first time on appeal. *See Glover v. U.S.*, 531 U.S. 198, 205, 121 S.Ct. 696, 701 (2001). KBC could have made this

---

tinue to restrain $277 million on the theory that these funds were sufficient to cover the judgment entered by the Texas Court, along with interest. Pet. App. 72a. Of the $277 million that continued to be restrained, only a small portion comprised Retention Fees, and the balance belonged to the Government. *Id.* at 74a.

argument before the Second Circuit when Pertamina sought review of the District Court's Final Judgment. It did not and its failure to do so is fatal in that regard.

Finally, even if the Court could consider KBC's argument in deciding this petition, the argument is meritless. KBC is urging the proposition that a judgment debtor cannot raise the argument that property subject to execution belongs to a third party. Of course, KBC offers no support for such a proposition. Moreover, such a proposition makes no sense, because a judgment debtor in such circumstances would be exposed to claims from such third party, and, therefore, injury-in-fact. Accordingly, the judgment debtor has every right to contest execution against such funds.

III. THE COURT SHOULD GRANT THE PETITION TO REESTABLISH THE PRINCIPLES OF COMITY DISREGARDED BY THE COURTS BELOW

In the Petition, Pertamina argued that to achieve the "worthy goals of comity[,]" *Gen. Elec. Co. v. Deutz A.G.*, 270 F.3d 144, 160 (3d Cir. 2001), federal courts should grant very substantial deference to a foreign sovereign's determination of the content of its own laws. Pertamina also noted that federal courts have accorded "substantial deference" to the "construction" a foreign sovereign "places upon its domestic law" when the foreign sovereign is a litigant. *See* Petition at 11-12. In fact, as Pertamina pointed out and KBC concedes, the Second Circuit in an earlier opinion in this case at least purported to recognize the principle of deference to the position of a foreign sovereign in connection with the interpretation of that sovereign's laws. *See* Petition at 12 and Pet. App. 128-129a; Opposi-

tion at 15-16. However, the Second Circuit, in its summary decision, failed to apply, or even take into consideration, these principles and, as a result, reached a conclusion that is at odds with well-established international legal principles in the context of litigation involving foreign sovereigns. To assure comity its proper role, this Court should clarify the degree of deference owed to the views of a foreign sovereign in such circumstances.

KBC has offered no persuasive argument to the contrary. Indeed, KBC contends that the Second Circuit "conducted painstaking examinations of each of the Indonesian laws relied upon by Pertamina and the [Ministry]," although it fails to point out any part of the Second Circuit's summary decision reflecting such "painstaking examination." Opposition at 12. The fact is that the Second Circuit disregarded Indonesian law in holding that Pertamina owned the Refinery Revenues because they constituted "property within Pertamina's control, which only Pertamina controls." Pet. App. 5a.

Likewise, KBC misses the point with respect to the Second Circuit's misconstruction of Indonesian law insofar as it found that "Indonesia acts like a guarantor of Pertamina's BBM operation." *See* Pet. App. 5a. KBC argues that the concept of guarantee is recognized under Indonesian law. *See* Opposition at 17. Whether or not that is true, it is irrelevant to the analogy drawn by the Second Circuit. As explained in the Petition, the reason that the Government cannot act "like a guarantor" for the BBM operation is because, under Indonesian law, the Government owns the Refinery Revenues.

Equally unpersuasive is KBC's argument concerning the authority of district courts to interpret foreign law. *See* Opposition at 14-16. The cases cited by KBC in support of its argument that "Rule 44.1 vests district courts with broad authority to determine foreign law" did not involve a foreign sovereign itself offering an interpretation of its domestic laws (which in this case effectuate an important public policy). For example, *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212 (3d Cir. 2006), involved an action by a consignee against a foreign-flagged cargo ship, a shipping company, and a charterer cargo damage. Likewise, *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694 (5th Cir. 1999), involved a dispute between private telecommunications companies and the Court of Appeals for the Fifth Circuit recognized that because of "the difficulty of interpreting foreign law, courts may defer to foreign government interpretations." *Id.* at 714.[3]

KBC does not even purport to respond to the important comity-based argument advanced by Pertamina in support of its Petition as to the significance of ensuring that substantial deference is accorded to a foreign sovereign's interpretation of its domestic laws. The core of Pertami-

[3] In the other case cited by KBC for this proposition, *In re Trans. Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997), while the determination of foreign law with respect to the status of an entity as the foreign government's agency or instrumentality pursuant to the Foreign Sovereign Immunities Act was an issue, the foreign government did not present its views regarding its domestic laws. Pertamina does not dispute that Rule 44.1 enables district courts to conduct an independent review of foreign law in most cases. What it does argue, however, is that when a foreign government offers its own interpretation of its domestic laws, then that interpretation should be afforded substantial deference, and far greater deference than was accorded here.

na's argument is that under the principles of comity, and, in particular, reciprocity, the United States would and should expect that a foreign court hearing an issue regarding U.S. regulation, adopted to support an important national policy, would afford substantial deference to the views expressed by representatives of the U.S. Government with respect to the proper operation and construction of such regulation. The Second Circuit's summary decision ignored these principles and, during a critical period for U.S. foreign policy, opened the door for foreign courts to ignore the U.S. Government's views regarding U.S. laws. This Court should therefore step in and clarify the degree of deference that should be accorded to a sovereign state's construction of its own significant legislation and regulation.

CONCLUSION

For all of the foregoing reasons and the reasons articulated in the Petition, Pertamina respectfully requests that the Court grant certiorari review and reverse the decision below.

Respectfully submitted,

/s/ HENRY WEISBURG

Henry Weisburg
Counsel of Record

Panagiotis Katsambas
SHEARMAN & STERLING LLP
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599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Counsel for Petitioner

August 16, 2006

APPENDIX A—EXCERPTS OF TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA (PERTAMINA),

Respondent.

March 14, 2005
4:55 P.M.

[4]

THE COURT: I am going to answer, as far as, I guess we will call them the LNG accounts, I can't recall how many decisions I wrote, two or three, but I was not dealing with insignificant issues.

* * *

THE COURT: On the LNG accounts, unless there is some matter of detail that I am ignoring, it seems to me that Pertamina was raising questions it had a right to raise. At least the things that I dealt with in my decisions. Indeed, I think some of that is still subject to appeal in the Court of Appeals.